No. 92-344

In the Supreme Court of the United States

OCTOBER TERM, 1992

GENE MCNARY, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL., PETITIONERS

v.

HAITIAN CENTERS COUNCIL, INC., ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED: AUGUST 24, 1992
CERTIORARI GRANTED: OCTOBER 5, 1992

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* The opinions of the court of appeals and district court are printed in the appendix to the petition for a writ of certiorari and have not been reproduced here.

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U.S. DISTRICT COURT
NEW YORK EASTERN
(BROOKLYN)

Civil Docket for Case # : 92-CV-1258

HAITIAN CENTERS, ET AL.

v.

MCNARY, ET AL.

RELEVANT DOCKET ENTRIES

Date	No.	PROCEEDINGS
3/18/92	1	COMPLAINT filed and summons(es) issued for Gene McNary, William P. Barr, James Baker III, Robert Kramek, Kime, Commandants, US Coas, U.S. Naval Base FILING FEE $120.00 RECEIPT #138354
		• • • • •
3/20/92	5	ORDER, that dft must opposition papers to plaintiff's application for a temporary restraining order by 3/20/92; and any reply by dfts by 3/23/92. (signed by Judge Sterling Johnson Jr., 3/18/92)
3/23/92	6	Calendar entry: before Judge Johnson on 3/17/92. Case called. All counsel present. Order to show cause for Tro and preliminary injunction hearing held. Motion hearing continued to 3/18/92 at 4:15.
3/23/92	7	Calendar entry: before Judge Johnson on 3/18/92. Case called. All counsel present. Order to show cause for TRO and Preliminary Injunction hearing held. Decision reserved. Govt's to submit response papers by 3/20/92.

Date	No.	PROCEEDINGS
3/24/92	8	REPLY by Haitian Centers, National Coalition, Immigration Law, Frantz Guerrier, Pascual Henry, Lauriton Guneau, Medilieu Sorel St. Fleur, Dieu Renel, Milot Baptiste, Jean Doe, Roges Noel, A. Iris Vilnor, Mireille Berger, Yvrose Pierre, Mathieu Noel to response to dfts' memorandum in opposition to plaintiffs' motions for temporary restraining order and expedited discovery. [Entry date 03/25/92]
3/24/92	9	EXHIBITS IN SUPPORT OF PLAINTIFF'S REPLY TO DFTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND TO DFT'S OPPOSITION TO PLAINTIFF'S MOTION FOR DISCOVERY filed. [Entry date 03/25/92]
		• • • • •
3/27/92	13	MEMORANDUM-DECISION AND ORDER: that dft are TEMPORARILY RESTRAINED FROM: (a) denying plaintiff service organization access to their clients for the purposes of providing them legal counsel, advocacy, and representation; (b) interviewing, screening, any Haitian citizen currently being detained on Guantanamo. It is Ordered that expedited discovery be granted—(i) dfts' must produce documents for inspection and copying by 3/31/92; and (ii) plaintiffs are granted leave to serve and depose dfts on 4/1/92 at 9:00; and it is further Ordered that dfts or their attorneys show cause on 4/1/92, why an order should not be entered granting plaintiffs' request for preliminary injunction. (signed by Judge Sterling Johnson Jr., 3/27/92) (for more details, see ORDER) [Entry date 03/31/92]
		• • • • •

Date	No.	PROCEEDINGS
4/1/92	16	MEMORANDUM by Haitian Centers, National Coalition, Immigration Law, Frantz Guerrier, Pascual Henry, Lauriton Guneau, Medilieu Sorel St. Fleur, Dieu Renel, Milot Baptiste, Jean Doe, Roges Noel, A. Iris Vilnor, Mireille Berger, Yvrose Pierre, Mathieu Noel in support of their MOTION for a Preliminary Injunction filed. EXHIBITS 30-67 attached.
4/3/92	17	MEMORANDUM by Gene McNary, William P. Barr, James Baker III, Robert Kramek, Kime, Commandants, US Coas, Commander, U.S. Nava in opposition to plaintiff's motion for Provisional Class Certification filed. [Entry date 04/06/92]
		• • • • •
4/6/92	21	Declaration of Captain Paul Blayney Chief, Operations Division, U.S. Coast Guard Atlantic Area.
4/6/92	22	TRANSCRIPT filed for telephone conference for dates of 3/28/92
4/7/92	23	MEMORANDUM AND ORDER: that the dfts are preliminarily enjoined from (a) denying plaintiff service organizations access to their clients for the purpose of providing them legal counsel, advocacy, and representation when scheduled for interviews; (b) interviewing, screening, or subjecting to exclusion or asylum proceedings any Haitian Citizen currently being detained on Guantanamo; and (c) repatriating any Haitian alien being detained on Guantanamo. (signed by Judge Sterling Johnson Jr., 4/6/93) [Entry date 04/08/92]

Date	No.	PROCEEDINGS
4/8/92	24	NOTICE OF APPEAL by Gene McNary, William P. Barr, James Baker III, Robert Kramek, Kime, Commandants, US Coas, Commander, U.S. Nava. Notice of appeal and certified copy of docket sent appealing [23-1] order. NO FEE. Aff of service attached. C of A notified.
4/8/92	25	MEMORANDUM AND ORDER: that the govt's motion to stay the execution of the preliminary injunction ordered by this Court dtd 4/6/93 id DENIED. (signed by Judge Sterling Johnson Jr., 4/8/92)
4/8/92	26	Calendar entry: Before Judge Johnson on 4/8/92 at 2:00 p.m. Case called for motion hearing. Counsel for all sides present via telephone except AUSA Scott Dunn. Deft's motion to stay preliminary injunction heard. Decision reserved. The court later denied deft's motion in a written order. [Entry date 04/09/92]
		* * * * *
4/20/92	35	MOTION by Gene McNary, William P. Barr, James Baker III, Robert Kramek, Kime, Commandants, US Coas, Commander, U.S. Nava to dismiss, Motion hearing [35-1] motion
4/20/92	36	GOVT EXHIBITS filed.
		* * * * *
4/20/92	38	ORDER filed at the USCA on 4/21/92 that the motion for stay pending appeal and expedition is DENIED so ordered by the USCA. Appeal is expedited. Appellant shall serve and file a brief on 4/17/92. Appellee shall file a brief by 4/24/92. Any reply brief shall be filed by 4/29/92. Argument shall be heard during the week of 5/4/92 on 5/7 or 5/8/92 subject to approval of presiding judge of that panel. Ackn mailed. Judge notified. USCA #92-6090. [Entry date 04/21/92]

Date	No.	PROCEEDINGS
4/21/92	40	NOTICE OF APPEAL by Gene McNary, William P. Barr, James Baker III, Robert Kramek, Kime, Commandants, US Coas, Commander, U.S. Nava Defendants/Appellants. Notice of appeal and certified copy of docket sent appealing [39-1] order. [Entry date 04/23/92]
4/22/92	39	ORDER: to clarify the relief granted in the Memorandum and Order of 4/6/92: it is ORDERED that the govt is enjoined from: (a) denying the Haitian Service Organizations immediate access, on Guantanamo, to any member of the class of Screened in Plaintiffs subject to resonable time, place and manner limitations. (b) interviewing, screening, or subject to exclusion or asylum proceedings any Screened In Plaintiff who has been denied an opportunity to communicate with counsel; and (c) repatriating any member of class of Screened In Plaintiffs who was subjected to a second interview at which time s/he was screened out, until such time as such individual is afforded an opportunity to communicate with the Haitian Service Organizations and given another interview. Notwithstanding paragraphs (b) and (c), the govt may, at any time, transport members of the Screened In Plaintiff class to the mainland U.S. in accordance with the govt's representations to this Court. (signed by Judge Sterling Johnson Jr., 4/15/92)
4/22/92	41	MEMORANDUM AND ORDER: that the govt's application to stay the enforcement of paragraph "(a)" of the Order of 4/15/92 is denied. (signed by Judge Sterling Johnson Jr., 4/16/92) [Entry date 04/24/92]
		* * * * *

Date	No.	PROCEEDINGS
4/28/92	50	Letter dtd 4/22/92 from Francis Lorson to Kenneth Starr enclosing order re this case. (Order attached) [Entry date 04/30/92]
		* * * * *
5/1/92	55	MEMORANDUM AND ORDER: "In light of the U.S. Supreme Court's recent stay of the preliminary injunction this court issued on 4/6/92, and clarified on 4/15/92, I am declining to sign the plaintiffs' application for a temporary restraining order at this time. The plaintiffs are hereby granted leave to renew their application following the disposition of the expedited appeal by the U.S. Court of Appeals for the Second Circuit. So Ordered." (signed by Judge Sterling Johnson Jr., 4/27/92)
		* * * * *
5/28/92	60	Letter dtd 5/28/92 from Harold Koh to Judge Johnson enclosing the immediate issuance of a temporary restraining order pending a hearing on a request for a preliminary injunction. Order to Show Cause for a temporary restraining order w/exhibits A-I attached, but UNSIGNED. [Entry date 05/29/92]
6/1/92	61	ATTACHMENTS IN SUPPORT of dfts' opposition to the entry of injunctive relief respecting the new executive order.
6/1/92	92	Dfts' OPPOSITION to the entry of injunctive relief respecting the new executive order.
6/2/92	63	Documents enclosed in an envelop—Attach to end of exhibit 88. Submitted by Simpson Thacher & Bartlett.
6/2/92	64	Plaintiffs REPLY to dfts' opposition to plaintiffs' order to show cause filed. [Entry date 06/03/92]
		* * * * *

Date	No.	PROCEEDINGS
6/8/92	67	NOTICE OF APPEAL by Haitian Centers, National Coalition, Immigration Law, Frantz Guerrier, Pascual Henry, Lauriton Guneau, Medilieu Sorel St. Fleur, Dieu Renel, Milot Baptiste, Jean Doe, Roges Noel, A. Iris Vilnor, Mireille Berger, Yvrose Pierre, Mathieu Noel Defendants/Appellants Fee Paid $105.00 Receipt #140939. Notice of appeal and certified copy of docket sent appealing [66-1] order. Ackn of service attached. C of A notified. [Entry date 06/09/92]
6/9/92	66	ORDER dated 6/5/92 order that the relief sought by plaintiffs on order to show cause for a temporary restraining order pursuant to F.R. Civ. P. 65 restraining the Govt. repatriating any Haitian to Haiti, is denied. (signed by Judge Sterling Johnson Jr.)
		* * * * *
6/15/92	69	MANDATE OF USCA dtd 6/10/92 Re: [67-1] appeal. Judgment of District Court is affirmed as modified in accordance with the opinion of USCA. Judge notified. Acknowledgment returned to USCA. USCA #92-6090 and 92-6104. Issued as Mandate 6/11/92.
7/30/92	70	ORDER: In accordance with the 7/29/92 decision of the Court of Appeals for the 2nd Circuit reversing this court's decision in Memorandum and Order dtd 6/5/92 and remanding the case to this court with instructions to enter an injunction, it is Ordered, that the dfts are preliminarily enjoined from returning to Haiti any interdicted Haitian whose life or freedom would be threatened on account of his or her race, religion, nationality, membership in a particular social group, or political opinion. (signed by Judge Sterling Johnson Jr., 7/29/92)

Date	No.	PROCEEDINGS
8/4/92	71	MANDATE OF USCA (certified copy) Re: [67-1] appeal, [40-1] appeal, [24-1] appeal. The Order of the District Court is REVERSED and REMAND with direction to grant the injunction requested by plaintiffs. Majority opinions attached with dissents in a separate opinion. Issued as mandate on 7/29/92. Judge notified. Ackn mailed. USCA #92-6144. (See document for further details).
8/5/92	72	MANDATE (ORDER) filed at the USCA on 7/30/92 the motion of the United States to recall and stay this Court's mandate, it is ORDERED that the injunction issued 7/29/92 by the District Court in conformity with our mandate is stayed for 48 hours to permit the orderly consideration of such further application for a stay as the U.S. may seek from the Supreme Court or a Justice thereof. Judge Walker would grant the motion for a stay in full. Judge notified. Ackn mailed. USCA #92-6144.
8/10/92	—	Record on appeal returned from U.S. Court of Appeals: [67-1] appeal, [40-1] appeal, [24-1] appeal
8/17/92	73	Letter dtd 8/3/92 from Clerk Lorson from the Supreme Court to Judge Starr enclosing order of 8/1/92. (Copy of order attached.)
		• • • • •
9/22/92	77	Calendar entry: before Judge SJ on 9/22/92 for conference. Case called. All counsel present. Gov't to file writ of Cert. by 7/23/93; plaintiff will not amend complaint; motion to dismiss by gov't pending before the Court. Plaintiffs makes application for bifurcate

Date	No.	PROCEEDINGS
		trial. Gov't to submit letter brief by 9/24/92; plaintiff to respond by 9/25/92. [Entry date 09/29/92]
		• • • • •

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 96-6144

HAITIAN CTRS COUNCIL, ET AL.

v.

MCNARY, ET AL.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
6/8/92	NOTE: See Related Case: 92-6090(L) . . .
6/8/92	Appellants Haitian Centers Council, Inc., Natl Coalition for Haitian Refugees, Immigration Law Clinic, Frantz Guerrier, Pascal Henry, Lauriton Guneau et al. motion to expedite appeal, FILED.
	* * * * *
6/16/92	Copy of district court docket entries and notice of appeal on behalf of Appellants Haitian Centers Coun, Natl Coalition for H, Immigration Law Clin, Frantz Guerrier, Pascal Henry, Lauriton Guneau, Medilieu Sorel St. Fleur, Dieu Renel, Milot Baptiste, Jean Doe, Roges Noel, A. Iris Vilnor, Mireille Berger, Yvrose Pierre and Mathieu Noel filed. [92-6144]
	* * * * *
6/18/92	Order FILED GRANTING motion for expedite appeal [290367-1] by Appellant Haitian Centers Coun, Natl Coalition for H, Immigration Law Clin, Frantz Guerrier Dr., Pascal Henry, Lauriton Guneau, endorsed on motion form dated 6/8/92.

DATE	PROCEEDINGS
6/18/92	Expedited scheduling order filed. Record on appeal is due on 6/18/92. Appellant's brief and appendix due on 6/18/92. Appellee's brief is due on 6/24/92. Appellant's reply brief is due on 6/25/92. (Typwritten papers will be accepted) Argument will be heard on 6/26/92. SEE ATTACHED ORDER DATED JUNE 18, 1992
6/18/92	Set for argument on 6/26/92. [92-6144]
	* * * * *
6/18/92	Appellants Haitian Centers Coun, Natl Coalition for H, Immigration Law Clin, Frantz Guerrier, Pascal Henry, Lauriton Medilieu Sorel St. Fleur, Dieu Renel, Milot Baptiste, Jean Doe, Roges Noel, A. Iris Vilnor, Mireille Berger, Yvrose Pierre, Mathieu Noel brief FILED with proof of service.
6/24/92	Appellants Haitian Centers Coun, Natl Coalition for H, Immigration Law Clin, Frantz Guerrier, Pascal Henry, Lauriton Guneau, Medilieu Sorel St. Fleur, Dieu Renel, Milot Baptiste, Jean Doe, Roges Noel, A. Iris Vilnor, Mireille Berger, Yvrose Pierre, Mathieu Noel joint appendix filed w/pfs. Number of volumes: 3.
6/24/92	Set for argument on 6/26/92 [92-6144] (cal)
	* * * * *
6/24/92	Appellees Gene McNary, William P. Barr, INS, James Baker, Rear Admiral Kramek, Admiral Kime brief filed with proof of service.
	* * * * *
6/26/92	Case heard before NEWMAN, PRATT, WALKER, C.JJ. (TAPE: #250-251)
6/26/92	Appellants Haitian Centers Coun, Natl Coalition for H, Immigration Law Clin, Frantz Guerrier, Pascal Henry, Lauriton Guneau, Medilieu Sorel St. Fleur, Dieu Renel, Milot Baptiste, Jean Doe,

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DATE	PROCEEDINGS
	Roges Noel, A. Iris Vilnor, Mireille Berger, Yvrose Pierre, Mathieu Noel reply brief filed with proof of service.
7/28/92	Judgment MANDATE ISSUED.
7/29/92	Judgment is reversed and the case is remanded to the district court with instructions to enter an injunction prohibiting the defendants from returning to Haiti any interdicted Haitian whose life or freedom would be threatened on account of his or her race, religion, nationality, membership in a particular social group, or political opinion, by published signed opinion per Judge Pratt. MANDATE SHALL ISSUE FORTHWITH.
7/29/92	Judge Newman concurring in a separate opinion filed.
7/29/92	Judge Walker DISSENTING in a separate opinion filed.
7/29/92	Judgment filed.
7/29/92	Copy of faxed Letter dated July 29, 1992 from attorney Harold Hongju Koh, counsel for Haitian Centers Council, et al., in re: anticipation of a motion to stay of the mandate. (cc: panel)
7/29/92	Faxed copy of Judge Sterling Johnson, Jr., USDJ, order that the defendants are preliminarily enjoined pursuant to Fed. R. Civ. P. 65 from returning to Haiti any interdicted Haitian whoselife or freedom would be threatenedd on account of his or her race, religion, nationality, or political opinion, received
7/30/92	Appellees Gene McNary, William P. Barr, INS, James Baker, Rear Admiral Kramek, Admiral Kime, Commander, U.S. Naval Base, Guantanamo Bay, motion to recall mandate and stay madate pending the filing and disposition of a writ of certiorari in the US Supreme Court, FILED. [304596-1]

DATE	PROCEEDINGS
7/30/92	Letter dated July 30, 1992 from attorney Harold Hongju Koh, counsel for Haitian Centers Council, Inc., et al., and the government's motion to re call mandate, received (cc: panel).
7/30/92	Appellant Haitian Centers Coun et al., affidavit in opposition to the motion of appellees to recall mandate [304596-1] and stay mandate pending pending certiorari, filed.
7/30/92	Order FILED GRANTING motion to recall mandate [304596-1] by Appellee Gene McNary, William P. Barr, INS, James Baker III, Rear Admiral Kramek, Admiral Kime, endorsed on motion form dated 7/30/92. Upon consideration of the motion United States to recall and stay this Court's mandate, it is hereby Ordered that the injunction issued July 29, 1992, by the District Court in conformity with our mandate is stayed for 48 hours to permit the orderely consideration of such further application for a stay as the United States may seek from the Supreme Court or a Justice thereof. Judge Walker would grant the motion for a stay in full.
8/5/92	Order filed stating that the Supreme Court has granted an application for stay and it is ordered that the judgment of the United States Court of Appeals are stayed pending the filing of a petition for a writ of certiorari on or before August 24, 1992.
8/28/92	Notice of filing petition for writ of certiorari for Appellees Gene McNary, INS, et al., dated August 24, 1992 filed. Supreme Ct. #92-344.
10/13/92	Certified copy of Supreme Court order GRANTING petition for writ of certiorari [313006-1] by Appellee Gene McNary, INS, endorsed on motion form dated 8/28/92. dated October 5, 1992.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV-92-1258

HAITIAN CENTERS COUNCIL, INC. NATIONAL COALITION FOR HAITIAN REFUGEES, INC., IMMIGRATION LAW CLINIC OF THE JEROME N. FRANK LEGAL SERVICES ORGANIZATION, OF NEW HAVEN, CONNECTICUT; DR. FRANTZ GUERRIER, PASCAL HENRY, LAURITON GUNEAU, MEDILIEU SOREL ST. FLEUR, DIEU RÈNEL, MILOT BAPTISTE, JEAN DOE, and ROGES NOEL on behalf of themselves and all others similarly situated; A. IRIS VILNOR on behalf of herself and all others similarly situated; MIREILLE BERGER, YVROSE PIERRE and MATHIEU NOEL on behalf of themselves and all others similarly situated, PLAINTIFFS

vs.

GENE MCNARY, Commissioner, Immigration and Naturalization Service; WILLIAM P. BARR, Attorney General; IMMIGRATION AND NATURALIZATION SERVICE; JAMES BAKER, III, Secretary of State; REAR ADMIRAL ROBERT KRAMEK and ADMIRAL KIME, COMMANDANTS, United States Coast Guard; and COMMANDER U.S. NAVAL BASE, GUANTANAMO BAY, DEFENDANTS

COMPLAINT

Plaintiffs Haitian Centers Council, Inc., National Coalition for Haitian Refugees, Inc., Immigration Law Clinic of the Jerome N. Frank Legal Services Organization, of New Haven, Connecticut (hereinafter "Haitian Service Organizations"); Dr. Frantz Guerrier, Pascal Henry, Lauriton Guneau, Medilieu Sorel St. Fleur, Dieu Renel, Milot Baptiste, Jean Doe, and Roges Noel on behalf of themselves and all others similarly situated (hereinafter

"screened in plaintiffs"); A. Iris Vilnor on behalf of herself and all others similarly situated (hereinafter "screened out plaintiffs"); and Mireille Berger, Yvrose Pierre and Mathieu Noel on behalf of themselves and all others similiarly situated (hereinafter "immediate relative plaintiffs"), by their undersigned attorneys, as and for their complaint, allege as follows:

PRELIMINARY STATEMENT

1. This is a complaint for declaratory and injunctive relief arising from defendants' illegal and arbitrary actions against Haitians and Haitian Service Organizations following the military coup that overthrew the government of Jean-Bertrand Aristide on September 30, 1991. Following the coup, many Haitians fled their country because of a well-founded fear of political persecution. Defendants have all but ignored those fears. Although binding domestic and international law mandates that refugees, such as the Haitian plaintiffs in this action, shall not be returned to countries where they face death and political persecution, defendants have interdicted numerous vessels on the high seas carrying the Haitian refugees to freedom. Defendants have detained those refugees at Guantanamo Bay Naval Base and subjected them to screening procedures nowhere mentioned in the Immigration and Nationality Act (INA). Refugees who have been "screened out" are then forcibly repatriated to Haiti to face death, injury or political persecution. Those who have been "screened in" remain detained and uncounseled for the most part, even as they await further proceedings that may lead to their forced repatriation.

2. Although the First Amendment protects the right of lawyers to talk with their clients, defendant officials have barred plaintiff legal and advocacy groups from speaking to Haitian refugees held incommunicado within U.S. jurisdiction, based solely upon the content of the message those representatives would communicate. Defendants

simultaneously have barred plaintiff Haitian refugees from communicating with their retained counsel, even while subjecting those refugees to screening and exclusion proceedings that may lead to their death or serious injury. Since the September coup, lower executive officials have acted arbitrarily and capriciously and in violation of unambiguous constitutional, statutory, presidential, and administrative mandates to coerce and detain plaintiff refugees and to diminish their right to resist forced repatriation to a brutal regime the United States Government has called illegitimate. In so doing, defendants have ignored binding international obligations that have been executed as United States law and which deny them discretion to return political refugees to a country where those refugees have a well-founded fear of political persecution. Finally, defendants impermissibly have applied these unauthorized, *ad hoc* procedures solely against Haitian refugees, based on their race and national origin.

JURISDICTION AND VENUE

3. Plaintiffs' claims arise under the Immigration and Nationality Act, 8 U.S.C. Sections 101(a)(43), 1157(c), 1158, 1182, 1225, 1226, 1253(h), 1362, the Refugee Act of 1980, 8 U.S.C. Section 1521, regulations promulgated thereunder, the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*, Executive Order No. 12324 of September 1981, 46 Fed. Reg. 48107, the INS's Interdiction Guidelines and Operations Instructions of October 6, 1981, the First and Fifth Amendments to the United States Constitution, the Agreement Effected by Exchange of Notes Between the United States and the Republic of Haiti of September 23, 1981, the United Nations Protocol Relating to the Status of Refugees, and principles of customary international law. Jurisdiction is based on 28 U.S.C. § 1331, as a civil action arising under the Constitution, laws, or treaties of the United States; 8 U.S.C. § 1329, as a civil action arising under the Immigration and Nationality Act, as amended; 5 U.S.C. § 702 as a civil action arising under the Administrative Procedure Act; and 28 U.S.C. § 2201, 2202 as a civil action seeking, in addition to other remedies, a declaratory judgment.

4. Venue is proper in this district under 28 U.S.C. Section 1391(e)(3) because the defendants include officers and employees of the United States and agencies thereof acting in their official capacity, and because plaintiff Haitian Centers Council, Inc. ("HCC") is a not-for-profit corporation organized and existing under the laws of the State of New York and has its principal place of business in Brooklyn, New York. Individual named plaintiff Yvrose Pierre is a resident of Brooklyn, N.Y. No real property is involved in this action.

PARTIES

A. *Plaintiffs*

5. Plaintiff Haitian Centers Council ("HCC") is a not-for-profit corporation organized and existing under the laws of the State of New York, having its principal place of business at 50 Court Street, Brooklyn, New York. It provides a variety of services to the Haitian community, particularly the refugee community. Its clients have included thousands of Haitian refugees, including many that have fled Haiti by boat. Among its services HCC provides *pro bono* legal counsel on immigration questions for refugees seeking political asylum. HCC also provides services concerning employment, family counseling, job placement, AIDS education and prevention, education and health. It represents all Haitians that need its services, and part of its mission is advocacy on behalf of Haitian refugees. It has sought and continues to seek to provide services, legal and otherwise, to Haitians who have fled Haiti and been interdicted by defendants since the September 1991 coup. Defendants have denied HCC access to its clients on Guantanamo Bay Naval Base, thereby hind-

ering its ability to provide effective representation to its interdicted clients.

6. Plaintiff National Coalition for Haitian Refugees, Inc. ("NCHR") is a not-for-profit corporation organized and existing under the laws of the State of New York, having its principal place of business in New York City. NCHR is comprised of prominent labor, religious, immigrant and refugee organizations. Formed in 1982, NCHR was designed to respond expressly to the plight of refugees fleeing repression in Haiti and seeking new lives in the United States. NCHR monitors and advocates for the rights of Haitians and provides legal and other services to Haitian asylum seekers—its clients—both within and outside the United States. NCHR seeks to represent those clients' interests in this lawsuit. Defendants have denied NCHR access to its clients on Guantanamo Bay Naval Base, thereby hindering its ability to provide effective representation to its interdicted clients.

7. The Immigration Law Clinic of the Jerome N. Frank Legal Services Organization, of New Haven, Connecticut was organized in 1989 at the Yale Law School as a faculty-supervised clinical course to render *pro bono* legal assistance to refugees filing asylum claims. Clinic members currently are counseling Haitian refugees in the United States who previously were detained by defendants at Guantanamo Bay Naval Base or on Coast Guard cutters.

8. The individual named plaintiffs Dr. Franz Guerrier, Pascal Henry, Lauriton Guneau, Medilieu Sorel St. Fleur, Dieu Renel, Milot Baptiste and Roges Noel, on information and belief, are Haitian refugees who have been "screened in" and are being held in detention at Guantanamo Bay Naval Base. They have retained plaintiff Haitian Service Organizations as their counsel. These named plaintiffs also represent other similarly situated persons detained within U.S. jurisdiction on Coast Guard cutters or at Guantanamo Bay Naval Base (the "screened in plaintiffs"). On information and belief, defendants have screened in some

6,000 Haitian detainees as having credible claims for political asylum. Although the "screened in" Haitians were supposed to be brought to the United States and afforded full procedural safeguards, including the right to counsel, many of them have languished at Guantanamo Bay and have not been informed of their screened-in status or of their procedural rights. They seek, and are entitled to seek, political asylum in the United States. They have a substantive right not to be forcibly returned to Haiti, where they face persecutions because of their political opinions and risk unlawful arrest, detention, persecution and possible death. They also seek the enforcement of the U.S. government's obligations under domestic and international law. Plaintiff Haitian Service Organizations consider the above named plaintiffs and similarly situated persons to be clients of their organizations by virtue of their seeking asylum status. These "screened in" Haitians are being detained incommunicado at Guantanamo and denied their right to communicate with retained counsel and/or to communicate with counsel they wish to retain. Contrary to defendants' previous assertions that asylum processing would take place in the United States with lawfully guaranteed procedures, including right to counsel, some of these "screened in" Haitians are being processed for political asylum on Guantanamo.

9. Jean Doe, a Haitian presently detained on Guantanamo, is one of the "screened in" plaintiffs who, along with at least 200 others, is being processed by INS asylum officers for political asylum at Guantanamo. This processing is taking place contrary to defendants' previous assertion that such processing would take place in the United States where plaintiffs would clearly have substantial statutory procedural rights, including the right to counsel. This change in policy and practice occurred on or about March 10, 1992. Despite the fact that he is being processed for political asylum, plaintiff is not being provided with any counsel, any right of rebuttal or any of the

other procedural safeguards required by the Immigration and Nationality Act, regulations and due process. On information and belief, plaintiff wishes to challenge the arbitrary and *ad hoc* procedures which he confronts, and has made a written objection to defendants or their agents regarding the additional tier(s) of screening to which he is being subjected. On information and belief, he has refused to be "rescreened," on the grounds that defendants or their agents promised that he and others similarly situated would be processed for asylum on Guantanamo, and that to be rescreened on Guantanamo deprives him of the right to consult with counsel regarding his rights in such a proceeding. Plaintiff Haitian Service Organizations consider the above-named plaintiff and similarly situated persons to be clients and constituents of Haitian Service Organizations by virtue of their seeking refugee or asylum status. The above-named plaintiff sues under a pseudonym because, on information and belief, he fears retaliation against himself and/or his family for participation in this legal challenge. He sues on behalf of himself and other detainees similarly situated.

10. The individual named plaintiff A. Iris Vilnor is, on information and belief, a Haitian being held in detention on Guantanamo who has been "screened out" by the INS. By being screened out, she will be returned forcibly to Haiti without further proceedings to face likely persecution and possible injury or death. On information and belief, approximately 8,000 Haitian detainees have been screened out by defendants. On information and belief, less than 1,000 now remain at Guantanamo Bay Naval Base. The named plaintiff also represents other similarly situated persons (the "screened out plaintiffs") detained within U.S. jurisdiction on cutters or at Guantanamo Bay Naval Base who seek, and are entitled to seek, political asylum in the United States. The named plaintiff has retained the Haitian Service Organizations as her advocate and legal counsel and represents the interests of

others who have retained legal counsel or who seek to retain such counsel. The plaintiff wishes to consult with her counsel in order to pursue her right to apply for political asylum and to have her legal options explained to her. She has a substantive right not to be forcibly returned to Haiti, where she faces persecution because of her political opinions and the risk of unlawful arrest, detention, persecution and possible death. She also seeks the enforcement of the U.S. government's obligations under domestic and international law. Because of the arbitrary and capricious program instituted by defendants, plaintiff has not had a meaningful opportunity to present her asylum claim. The Haitian Service Organizations consider the above named plaintiff and similarly situated persons to be their clients by virtue of their seeking refugee or asylum status. The intercepted Haitians are entitled to seek effective assistance from the Haitian Service Organizations, and likewise, the Haitian Service Organizations would assist the interdicted Haitians regarding their desires to seek asylum status if so permitted by defendants.

11. Plaintiff Mireille Berger is a lawful permanent resident of the United States living in Brooklyn, New York. She was born in Haiti and is a Haitian citizen. Three of her first cousins are Haitian citizens who presently are being detained on Guantanamo. She sues on her own behalf and on behalf of other Haitians in the United States who have relatives detained on Guantanamo (the "relative plaintiffs"). This plaintiff and the class she represents are being denied their First Amendment associational rights with their detained relatives and their interest in having the United States immigration laws applied to their relatives without discrimination on the basis of national origin.

12. Plaintiff Yvrose Pierre is a lawful permanent resident of the United States living in Brooklyn, New York. Her two daughters, both minors, now aged sixteen and

seventeen, fled from Haiti in November or December 1991, were interdicted by the U.S. Coast Guard and detained by defendants at Guantanamo Bay. The older of the two daughters was forcibly repatriated to Haiti at the end of January. On information and belief, the younger daughter is still being detained on Guanantmo by defendants. This plaintiff and the class the she represents (the "immediate relative plaintiffs") are being denied First Amendment associational rights and their interest in having the United States immigration laws applied without discrimination on the basis of national origin.

13. Plaintiff Mathius Noel is a naturalized citizen of the United States living in Waterford, Connecticut. His brother, aged 27, fled from Haiti in late February, 1992, was interdicted by the U.S. Coast Guard and on information and belief now is being detained at Guantanamo Bay. He sues on his own behalf and on behalf of other Haitians in the United States who have relatives detained on Guantanamo. This plaintiff and the class he represents are being denied First Amendment associational rights and their interest in having the United States immigration laws applied without discrimination on the basis of national origin.

B. Defendants

14. Defendant Gene McNary is the Commissioner of the Immigration and Naturalization Service ("INS"). He is in charge of implementing the practices and procedures under which plaintiffs are denied their statutory and constitutional rights. The INS officers on board the United States Coast Guard cutters and at the U.S. Naval Base at Guantanamo Bay are acting under his direction and supervision. Defendant McNary is being sued in his official capacity.

15. Defendant William P. Barr, III, is the United States Attorney General and in that capacity has ultimate responsibility for the enforcement of the immigration laws

of the United States. Defendant Barr is being sued in his official capacity.

16. Defendant James Baker, III, is the United States Secretary of State and in that capacity has the final decision-making authority within his department. Upon information and belief, the State Department has directed other United States agencies forcibly to repatriate Haitian refugees. Defendant Baker is being sued in his official capacity.

17. Defendants Kramek and Kime are Commandants of the United States Coast Guard. Other Coast Guard officers implementing the interdiction program are acting under their direction and command. These defendants are being sued in their official capacity.

18. Defendant Commander of the United States Naval Base has general jurisdiction over the United States' military operations at Guantanamo.

19. Defendant Immigration and Nationalization Service (INS) is the agency charged with direct responsibility for enforcing the immigration laws of the United States.

STATEMENT OF FACTS

20. On September 30, 1991, a military coup ousted Haitian President Jean-Bertrand Aristide. President Aristide had been elected in December 1990 in the first fully democratic elections to take place in Haiti in over 200 years.

21. The United States government refused to recognize the military junta which succeeded President Aristide. President Bush issued Executive Orders freezing all assets of Haiti in the United States and prohibiting United States citizens from transacting any business with the military junta. In Executive Order 12779, the President recognized that "the grave events in the Republic of Haiti . . . are continuing to disrupt the legitimate exercise of power by the democratically elected government of that country."

22. The September 1991 coup triggered a continuing, widely publicized reign of terror in Haiti. On information and belief, in the past five months, over fifteen hundred Haitians, many of them supporters of the Aristide government have been killed or subjected to violence and destruction of their property because of their political beliefs and affiliations, producing fear and desperation throughout the country.

23. As a result of these grave conditions, thousands of Haitians have fled the brutality of the illegal Haitian regime. Thousands of refugees have fled to the Dominican Republic. Thousands more have set out in small boats that are often overloaded, unseaworthy, lacking basic safety equipment, and operated by inexperienced persons, braving the hazards of a prolonged journey over high seas in search of safety and freedom.

24. United States Coast Guard cutters on patrol in the international waters of the Windward Passage near Haiti have intercepted and are intercepting vessels carrying Haitians fleeing political persecution, many of whom have no desire to enter the United States and either have no specific destination in mind or are fleeing to a particular third country.

25. To date, countless vessels carrying Haitian refugees have been intercepted and more than 16,000 Haitians from these vessels have been detained since the coup. Initially, interdicted Haitians were taken to Guantanamo, where after being denied procedural safeguards, including the right to counsel, the Haitian detainees were interviewed summarily and classified as "screened in" or "screened out." The "screened out" detainees thereby lost any opportunity to demonstrate that they were political refugees who should not be forcibly returned to Haiti because of a well-founded fear of persecution. The "screened in" detainees were supposed to be brought to the United States and afforded the full panoply of procedural safeguards in asserting their political asylum

claims, including the right to counsel, although only a small number have apparently been so treated.

26. Well over 14,000 Haitians have been taken to the United States Naval Base at Guantanamo Bay, where they have been detained incommunicado week after week. Guantanamo Naval Base and the Coast Guard cutters on which the Haitians were originally detained are wholly within the jurisdiction of the United States.

27. Despite repeated attempts by legal and advocacy groups to gain access to Haitian refugees on the Coast Guard cutters or at Guantanamo Bay, defendants have barred such access completely. At the same time, however, defendants have granted access to numerous other individuals, including clergy and church groups, the press, and even piano-tuners.

28. Although the forcible repatriation of the "screened out" Haitian detainees was for a period preliminarily enjoined by the United States District Court for the Southern District of Florida, the United States Court of Appeals for the Eleventh Circuit ultimately vacated all injunctions on February 4, 1992. On February 26, 1992, the Supreme Court denied certiorari, permitting the forcible repatriation of the "screened out" Haitian detainees to continue unchecked.

29. After the Supreme Court's denial of certiorari, defendants changed their screening policy by resuming screening on Coast Guard cutters and forcing some "screened in" Haitian refugees to undergo multiple layers of review before being brought to the United States. At present, defendants are purporting to adjudicate fully some Haitians' political asylum claims on Guantanamo while denying them access to counsel, the opportunity to rebut and submit evidence and other procedural safeguards. As a direct result of these procedural changes, the percentage of Haitians "screened in" has dropped precipitously. Defendants have provided no public notice in the Federal Register or otherwise to

plaintiff Haitian Service Organizations, to plaintiff Haitan refugees, or to any one else in the United States or elsewhere of these drastic changes in procedure that directly affect the life and liberty of plaintiff Haitian refugees and that continue to thwart the organizational purposes of plaintiff Haitian Service Organizations.

IMMEDIATE EVENTS GIVING RISE TO THIS LAWSUIT

30. With the removal of judicial oversight, defendants have resumed their total ban on the access of legal advocacy organizations to Haitian refugees being held incommunicado on Guantanamo or the cutters.

31. On March 11, 1992, plaintiffs' counsel wrote defendant McNary and the Commanding Officer of the U.S. Naval Air Station, Guantanamo Bay, requesting access on behalf of plaintiff Haitian Service Organizations to Haitian citizens currently being held at the United States Naval Base on Guantanamo Bay and on Coast Guard cutters off Guantanamo, for the purpose of providing them legal counsel, advocacy, and representation. In particular, plaintiffs' counsel requested access to communicate with named plaintiffs Dr. Frantz Guerrier, Pascal Henry, Lauriton Guneau, Medilieu Sorel St. Fleur, Dieu Renel, Milot Baptiste, A. Iris Vilnor and with the leaders of the organization known as the Association of Haitian Political Exiles. Plaintiffs' counsel requested that plaintiff Haitian Service Organizations be given immedate access to these Haitian individuals on such terms and conditions as might be reasonable to the Government, before 9 a.m. Monday, March 16, 1992. As of that date and time, no response has been received by plaintiffs' counsel. On information and belief, defendants have denied the requests of all legal and advocacy groups seeking such access.

32. During this same period, defendants have denied detained refugees any rights to obtain or communicate with counsel regarding their legal rights and options.

33. Defendant INS has altered substantive rules which have a substantial impact on the individuals regulated without following the rulemaking procedures set out in the Administrative Procedure Act, 5 U.S.C. § 551, *et seq.*, thus rendering them void. These altered substantive rules include, but are not limited to, rescreening of Guantanamo refugees already "screened in"; forcing such refugees into asylum proceedings on Guantanamo; and interviewing Haitian refugees on cutters.

34. Since the September coup, defendants have engaged in a pattern and practice of intimidating and coercing plaintiffs, of discouraging and diminishing their rights to asylum and to alternative-country placement, and of wilfully relying upon false information and prejudicial biases to effect forced repatriations. These practices include, but are not limited to:

a. Barring plaintiff "screened in" Haitian refugees who have been or will be screened again from communicating with counsel, while forcing them to undergo multiple tiers of screening, including, on information and belief, final adjudication of their political asylum claims on Guantanamo itself.

b. On information and belief, when defendants determined that improved screening procedures had raised the rate of Haitian refugees being "screened in," defendants, including officers of the State Department, developed new policies and new instructions for INS screening personnel, directing that fewer Haitians be "screened in" or deemed to have credible asylum claims. This directive was given without reference to the particular circumstances of any individual cases; defendant INS simply made known that the State Department and/or various Executive officers desired to see fewer asylum applicants from Haiti "screened in."

c. Defendant Immigration and Naturalization Service continues to rely on inaccurate and misleading State Department reports regarding the situation in Haiti.

d. On information and belief, defendant INS has urged greater reliance by its officials on State Department reports in preference to the reports of internationally-recognized Human Rights agencies.

e. On information and belief, defendant State Department has issued a directive to defendant Immigration and Naturalization Service instructing such defendants to include factors in their asylum determinations that are contrary to law.

f. United States officials have declared that all Haitian detainees on Guantanamo who have been "screened in" would be sent expeditiously to the United States for adjudication of their claims to asylum. As the defendants have represented in prior litigation:

> Under current practice, any aliens who satisfy the threshold standard *are to be brought to the United States so that they can file an application for asylum* under Section 208.02 of the Immigration and Nationality Act (INA), 80 SL § 118(a). These 'screened in' individuals then have the opportunity for a *full adjudicatory determination* of whether they satisfy the statutory standard of being a 'refugee' and otherwise qualify for the discretionary relief of asylum.

Op. Cert., *HRC v. Baker*, at 3. In direct contradiction to these public assurances of United States officials, following the end of judicial oversight, on February 29, 1992, Grover Joseph Rees, General Counsel of the INS, circulated a memo-

randum setting forth agency policy *not* to bring all "screened in" plaintiffs to the U.S., but to send additional INS asylum officers to Guantanamo in order to adjudicate the asylum claims of some Haitians who already have been "screened in." This adjudication is being carried out without counsel or any other procedural protections.

g. As of March 10, 1992, approximately 20 asylum officers were at Guantanamo Bay Naval Base. On information and belief, additional asylum officers are on their way or have already arrived at Guantanamo. These asylum officers have already begun to decide asylum claims of some of the "screened in" Haitians. The INS intends to treat the decisions of asylum officers as final and binding, resulting in either asylee/refugee status or immediate forcible repatriation for the plaintiff Haitians whose claims they decide.

h. Defendants have sought to discourage plaintiffs from pursuing their lawful asylum claims by publishing false and misleading stories in the Guantanamo camp newspaper suggesting that plaintiffs' chances for asylum are remote and implying that conditions in Haiti are now safe.

i. Defendants ask questions of Haitian plaintiffs that are designed to confuse and trick them, and to inhibit them from raising their valid claims to asylum. Defendants are additionally ignoring evidence that might support plaintiffs' claims.

35. Defendant officials intentionally have created and operated, because of the national origin and race of plaintiff Haitian refugees, an unauthorized, separate and unequal asylum track for Haitians only, which denies Haitian refugees the equal protection of the law, to wit: the substantive and procedural rights enjoyed by asylum

applicants of other racial and national groups; and the associational rights of the refugees' family members.

CLASS ACTION ALLEGATIONS

36. The named Haitian plaintiffs bring this action pursuant to Rule 23(a) and (b)(1)(2) on behalf of themselves and all other persons similarly situated in the following presently ascertainable classes:

37. All Haitian refugees who previously have been "screened in" and are now detained on Guantanamo, including those who may face or who have faced additional screening procedures, including but not limited to, those whose political asylum status defendants are purporting to adjudicate fully on Guantanamo, without right to counsel or other protections as required by law (hereinafter "screened in plaintiffs"). On information and belief, this group currently number over 6,000.

38. All Haitian refugees who have retained plaintiff Haitian Service Organizations as counsel, who may retain plaintiff organizations as counsel in the future, or who have the right to obtain assistance of counsel from other persons (hereinafter "Haitian Service Organization clients"). On information and belief, this group currently numbers over 6,000.

39. All Haitian refugees who are awaiting screening or have been "screened out" and currently are awaiting forcible repatriation, while being detained within territory subject to U.S. jurisdiction, whether on Coast Guard cutters, on Guantanamo Bay Naval Base, or outside the continental U.S. (hereinafter "screened out plaintiffs"). On information and belief, this group currently numbers approximately 200.

40. All fathers, mothers, sons, daughters, siblings, counsins and close relatives of members of any of the above classes who have been deprived of their rights to associate with their relatives because of defendants' actions (hereinafter "immediate relative plaintiffs"). On

information and belief, this group currently numbers over 1,000.

41. Plaintiff classes warrant class action treatment because; they are sufficiently numerous; defendants have acted or threatened to act on grounds generally applicable to each member of each class, thus making final declaratory and injunctive relief with respect to each class as a whole appropriate; the plaintiffs are adequate representatives of their classes and the claims of the named plaintiffs are both common to and typical of the claims of members of each class.

FIRST CLAIM FOR RELIEF

(Content-Based Denial of First Amendment Rights)

42. Plaintiffs repeat, reallege and incorporate paragraphs 1 through 41 above as though fully set forth herein.

43. Plaintiff Haitian Service Organizations are legal and advocacy groups formed for the organizational purpose of providing counseling, advocacy, and legal representation, without remuneration, to refugees, including Haitian refugees.

44. In furtherance of their organizational purposes, plaintiff Haitian Service Organizations seek to communicate with Haitian citizens, including the individual named plaintiffs, who are held at the United States Naval Base on Guantanamo Bay, and on Coast Guard cutters off Guantanamo, and elsewhere, for the purpose of providing them legal counsel, advocacy, and representation.

45. Defendants' refusal to allow plaintiff Haitian Service Organizations to have access to communicate with Haitian refugees being detained by the U.S. government at the U.S. Naval Base at Guantanamo Bay on Coast Guard cutters and elsewhere, denies plaintiffs' First Amendment rights. Defendants' allowing other individuals and organizations who are not competent to counsel plaintiff Haitian refugees on their asylum claims to gain

access to those refugees, is a content-based restriction on the free speech and association rights of plaintiff Haitian Service Organizations and therefore violates plaintiffs' rights under the First Amendment of the U.S. Constitution.

SECOND CLAIM FOR RELIEF

(Denial of Statutory Rights
to Obtain and Communicate with Counsel)

46. Plaintiffs repeat and reallege paragraphs 1 through 45 as though fully set forth herein.

47. Defendants have stopped, forcibly detained, and involuntarily transported the Haitian plaintiffs to Guantanamo Bay Naval Base, territory subject to U.S. jurisdiction and over which the United States exercises full jurisdiction and control in perpetuity. Defendants' actions constitute "inspections" for purposes of § 235 of the INA.

48. By detaining, interrogating, and "screening" Haitian plaintiffs, immigration officers have placed plaintiffs into the legal status of persons entitled to full exclusion proceedings as defined in §§ 235 and 236 of the INA. 8 U.S.C. §§ 1225, 1226.

49. Defendants' denial of Haitian plaintiffs' rights and the rights of the classes they represent to obtain counsel or to communicate with retained counsel in pursuing their claim for political asylum or in their exclusion proceedings violates plaintiffs' rights under INA § 292 8 U.S.C. § 1362.

50. Defendants' failure to notify Haitian plaintiffs of their statutory rights, including their right to obtain counsel or to communicate with counsel during screening, violates 8 C.F.R. § 242.1(c) (1990), requiring immigration officers to notify aliens of their right to counsel and the availability of free legal services programs. 8 C.F.R. § 242.1(c) (1990).

51. The determination at Guantanamo Bay Naval Base of plaintiff Haitians' asylum claims by INS asylum officers

violates plaintiffs' right to submit documentation, testimony, and affidavits of witnesses, as well as their right to counsel, as provided in INS agency regulations. 8 C.F.R. § 208.9 (1990), and Agency operating guidelines. INS Procedure Manual, at 17-19.

52. Defendants' intention to repatriate plaintiff "screened in" Haitians following the negative determination of their asylum claims by INS asylum officers violates plaintiffs' right to have 30 days to present affidavits of witnesses and additional evidence to rebut the denial of an asylum claim. INS Draft O.I. 208.12(a) (1991).

THIRD CLAIM FOR RELIEF

(Denial of Constitutional Rights
to Obtain and Communicate with Counsel)

53. Plaintiffs repeat and reallege paragraphs 1 through 52 as though fully set forth herein.

54. Defendants' denial of Haitian plaintiffs' rights and the rights of the class whom they represent to obtain counsel or to communicate with retained counsel in pursuing their claims for political asylum or in their exclusion proceedings violates the First and Fifth Amendment rights of Haitians plaintiff on Guantanamo to obtain counsel and to communicate with retained counsel.

FOURTH CLAIM FOR RELIEF

(Failure to Follow Rulemaking Procedures)

55. Plaintiffs repeat and reallege paragraphs 1 through 54 as if fully set forth herein.

56. The policies and practices recently initiated by the INS constitute substantive rules that have a substantial impact on the individuals regulated, on their family members lawfully in this country, on their legal representatives and political advocates, and on the general public.

57. Defendants' failure to publish these policy changes in the Federal Register and allow for notice and comment violates the rulemaking procedures set out in the

Administrative Procedure Act, 5 U.S.C. § 551, *et seq.*, and renders them void.

FIFTH CLAIM FOR RELIEF

(Arbitrary and Capricious Agency Action Not in Accordance With Law)

58. Plaintiffs repeat and reallege paragraphs 1 through 57 as though fully set forth herein.

59. Defendants' pattern and practice of intimidating and coercing plaintiffs, of discouraging and diminishing their rights to asylum and to alternative-country placement, and of wilfully relying upon false information and prejudicial biases to effect forced repatriations and to deny individual asylum claims on their merits are arbitrary and capricious, an abuse of discretion, not in accordance with law, and reviewable by this court under the Administrative Procedure Act, 5 U.S.C. Sec. 701 *et seq.*

SIXTH CLAIM FOR RELIEF

(Judicial Enforceability of Duty of Non-Refoulement)

60. Plaintiff Haitian refugees repeat and reallege paragraphs 1 through 59 as if fully set forth herein.

61. Defendant executive officials have a mandatory duty under domestic and international law not to return political refugees to a country where they will face persecution, and to provide adequate procedures to examine colorable asylum claims.

62. Defendants' duties are imposed by all treaties, domestic law, and executive directives that govern the Haitian interdiction program, including Article 33 of the United Nations Convention Relating to the Status of Refugees, 189 U.N.T.S. 150 (July 28, 1951), the Refugee Act of 1980, Pub. Law. No. 96-212, 94 Stat. 102 (1980), the Immigration and Nationality Act, 8 U.S.C. § 1253(h), Executive Order 12324, the U.S.-Haiti Agreement, Agreement Effected by Exchange of Notes, signed

at Port-au-Prince September 23, 1981, and the INS guidelines, INS Role in and Guidelines for Interdiction at Sea, Oct. 6, 1981.

63. Plaintiffs may secure judicial enforcement by injunction and declaratory judgment of those executive directives, statutes, and international agreements that execute our international obligations into domestic law.

SEVENTH CLAIM FOR RELIEF

(Equal Protection)

64. Plaintiffs repeat and reallege paragraphs 1 through 63 as though fully set forth herein.

65. Since the September 1991 coup, defendant officials have denied plaintiffs the equal protection of the laws by creating and operating an unauthorized, separate and unequal, asylum track for Haitians only. This second-class asylum regime denies both "screened in" and "screened out" Haitian refugees the substantive and procedural rights enjoyed by asylum applicants from other racial and national groups, injures the associational rights of the refugees' family members, and violates the intent of Congress, whose power is plenary in the immigration field.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs and the members of the classes they represent pray for declaratory and injunctive relief as follows:

(a) Certification of each class;

(b) A declaratory judgment that the defendants' practices alleged above violate the terms of Executive Order 12324, the guidelines promulgated pursuant to the Executive Order, the interdiction agreement betwen the United States and Haiti, the Refugee Act of 1980, the Immigration and Nationality Act Sections 101(a)(43), 208 and 243(h), the Administrative Procedure Act, the United Nations Protocol Relating to Status of Refugees, the

First and Fifth Amendments to the United States Constitution, customary international law, and other provisions of law;

(c) A declaratory judgment that the defendants' changes in practice violate the rulemaking requirements of the Administrative Procedure Act, and further declaring the actions taken or determinations made pursuant to defendants' recently instituted policies to be void;

(d) Setting aside the denial of asylum claims or the agency action "screening out" members of the plaintiffs' class as being arbitrary and capricious, not in accordance with law, and not in accordance with procedural requirements;

(e) Preliminary and permanent injunctive relief:

(i) Granting immediate access to plaintiff Haitian Service Organizations, their attorneys, employees, and members, to communicate with the Haitian plaintiffs detained at the Guantanamo Bay Naval Base and on Coast Guard cutters in order to advise these plaintiffs of their legal rights and options in the asylum process, as well as of the Organizations' interest in providing representation and assistance to them in furtherance of organizational goals;

(ii) Ordering defendants to ensure that plaintiff refugees are accorded their statutory and constitutional rights to communicate with counsel, so that they may have a full and fair opportunity to present the merits of their political asylum claims and to obtain advice about their legal options; and to render fair and regular determination of plaintiffs' asylum claims free from caprice and discrimination;

(iii) To refrain from sending back to Haiti those Haitians who have not been "screened in" as candidates for asylum until such time as procedures are implemented and followed which adequately protect and recognize the rights of these persons under the Executive Order, the INS guidelines promulgated pursuant thereto, the APA,

and international law, as well as the privileges ordinarily afforded potential asylum applicants under the Refugee Act of 1980 and the Immigration and Nationality Act;

(iv) Ordering defendants to cease and desist immediately from conducting interviewing, screening, exclusion proceedings or asylum hearings on Guantanamo and to transport all "screened in" plaintiffs expeditiously to the United States so that they may be accorded asylum hearings with the full panoply of statutory rights.

(v) Ordering defendants to refrain from taking any action pursuant to policies instituted in violation of the rulemaking requirements of the Administrative Procedure Act unless and until such policies are properly promulgated pursuant to the A.P.A. and restoring all rights and privileges that plaintiffs and the classes named herein may have been denied while these policies were in effect;

(f) Such other and further relief as the Court may deem just and proper, including reasonable attorneys' fees and costs.

Respectfully submitted,

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PLAINTIFFS' EXHIBIT NO. 28

STATEMENT OF LUMA DUKENS
A71-893-957

I have fled Haiti twice. I fled in November 1991 after the coup because the military had attacked many of those that belonged to the same peasant organization that I belonged to. I was returned to Haiti by the Coast Guard on November 20, 1991. After being returned, I was attacked and beaten by the military as an example to others who may want to flee. After being released I hid in the countryside and fled Haiti again on December 02, 1991. I was brought to the United States in mid-January from Guantanamo.

I was born in Bazin, Acul du Nord, Haiti. I attended school but have very little formal education. After school I worked as a fisherman and farmer in Bazin. When Jean Bertrand Aristide was elected President of Haiti I joined the Mouvement Peyizan Papaye ("MPP"). The leader of MPP in Port-au-Prince was * * * The leader, and my boss, in my area was * * *. We met often where we could speak freely. Through MPP we worked together to keep the community clean, build restrooms, provide literacy programs for children, and formed a treasury for those who fell ill. During the months President Aristide was in power, we told the Tonton Macoutes we would welcome them if they would change.

Immediately after the coup, I was involved in a large demonstration in Bazin. We were in the streets screaming "Give us our President Back" and "We won't let this happen again" and "Macoutes give us a chance." There were so many in the streets I would have been unable to count them all. While we were in the streets we heard on the Radio that people were being shot in the streets. The Radio station told us to stay off the streets. We all fled the streets. After we fled, I know that the military came and arrested some of the MPP members. These people

disappeared. Because of this treatment we couldn't bring the sick and injured to the hospital because we would have been caught. We refused to attend church for regular services or hold baptisms or weddings because the military would have come and arrested us. The military was working to track us down so I went into hiding in the bush.

While I was hiding from the military, who were running after us, I broke my leg. This was on the day after the coup, I believe. I could hear the soldiers shooting at us. Because no one could take me to the hospital for fear they would be caught, I could not get medical attention. And my family was too scared that I could be killed if they took me to a hospital for my broken leg. After some time in the bush, a group of us decided to leave. There were about 115 of us on our boat. Some friends carried me to a boat and we sailed away from Haiti. After a short time we were picked up by the Coast Guard.

I was held on the Coast guard boat and asked questions about why I left Haiti. They didn't spend much time questioning me. They didn't ask me the important questions I wanted to address. The people questioning me didn't identify themselves. There was a white person doing the interviewing and a Haitian doing the interpreting. I was afraid during the interview because they didn't ask me those important questions and I was afraid they were going to return me to Haiti. They asked me about my house, where I lived, my mother's name, where she lived, where I was born, that kind of thing, and then why I left Haiti. To the question why did I leave Haiti, I said I left Haiti because of political problems. I told them how dangerous it was for people like me there in Haiti and how my leg got broken fleeing from the military. I wanted to tell them more details, for example about what political groups I was a member of and why politics caused me to leave Haiti and why I was not able to go back now.

I was cut off by this man interviewing me or by the Haitian interpreter, I don't recall which, from telling these things. Before the interview I had not had much to eat and I was weak and not feeling well. I was also tired and my leg was hurting. I was only taken off the Coast Guard boat to have a cast put on my broken leg. I was then returned to Haiti.

At Port-au-Prince upon my return I was asked questions by the Red Cross and given $10 for bus fare. The Red Cross also made me sign something but they didn't tell me what I was signing so I don't know. Because I had a broken leg, a Red Cross van drove me from the boat terminal in Port-au-Prince to a bus station. Because I had a broken leg when I was sent back to Haiti, I don't know what happend to the others sent back with me, because I didn't go the same route as the others.

When I was in the Red Cross van, before the van started moving from the dock area, a group of soldiers was lined up outside the van. They sent one of the soldiers to the van and he asked me a number of questions. The van at that point wasn't too far from the greeting point on the dock. The soldier asked me for my mother's name, my father's name and where I lived, my age and how I broke my leg. I lied about how I broke my leg, told the soldier that it happened before the coup, but I told him the truth about the other questions because I didn't know whether they returned me to Haiti with my file (which had my real name, address etc). I was afraid and felt the situation when we got off the Coast Guard boat didn't make sense because I was photographed many times when I got off the Coast Guard boat in Haiti at the port. And I didn't know who were the photographers, whether they were the Tonton Macoutes or the government. I think maybe some journalists took pictures of us too, when we got off the boat but I was afraid of the Macoutes taking my picture, not of the journalists. I was afraid the Macoutes were taking my picture because once they knew

I was in the struggle they would come to my house to kill me. Once they have my picture they can recognize me and know I was in the struggle.

The Red Cross then dropped me off at the bus station. Because I would have needed $18 to travel to my family's house in Cap Haitian and the Red Cross only gave me $10, I could only travel to my cousin's house in Cite Soleil where he gave me food and money. So after I ate at my cousin's house, on the day I was sent back to Haiti, on November 20 or 21, 1991 I left my cousin's house on foot to get transportation to get to my mother's home in Bazin which is in Cap Haitien. But shortly after I left my cousin's house, I was stopped by a group of soldiers. This was still in Cite Soleil. I hadn't walked very far because my leg was in a cast, I was limping. These soldiers who stopped me were in blue uniforms and they were carrying guns, small pistols were attached to their belts and some had long guns too. I think maybe they belong to a section of the military called the Cafeteria. These soldiers asked me who I supported in the election. I lied and told them that I had supported Marc Bazin. Then they asked me why I left Haiti. I lied again and told them that Lavalas members had broken my leg. They did not believe me. They made me walk on my broken leg to a house where they detained me. I don't know if there was anyone else who saw the soldiers questioning me, I was so anxious I don't remember.

The house where the soldiers took me wasn't too far from where they questioned me. It was in Cite Soleil. Besides me, I only saw soldiers in this house.

Once I was in this house, the soldiers ordered me to lie flat on the floor, on my stomach. Then they hit me with a stick on my behind on my left side, the same side as my broken leg. They hit me I'm sure at least fifteen times. But I never changed my story.

I was out of myself with pain, from the beating. The soldiers were saying to me "you're going to have to tell

us the truth." I knew if I told them the truth about my political involvement I would be killed. I pretended I didn't know anything about Lavalas, that I hated that group. The soldiers kept me in that house for a while, long enough to beat me.

After they beat me, before the soldiers let me go, they told me that they could hurt me more but would not because they wanted people to see me and for me to tell others what can happen to Haitians who take boats and leave Haiti. They told me that they want me to be an example to others so they do not try to escape Haiti. One soldier told me "those of you who are leaving, you are causing trouble to Haiti." The soldiers told me that people like me who are risking their lives to leave the country by boat are making more problems for the country, particularly people like me with a broken leg, and that we were carrying misleading reports about Haiti. The soldier told me that the military was willing to counter these people with measures, that people who left the country like me could be arrested, beaten, killed and their bodies disposed of outside of anybody's awareness. The soldiers also said about the Haitians who left by boat, "You people have weapons and you're part of a group of Macoutes that Aristide hired, the same way Duvalier had." But we don't have weapons and all we want is fairness and justice and no more terrorizing of the people.

These soldiers may have followed me from the dock to my cousin's house, I don't know. I wouldn't be able to recognize the soldiers in Haiti because you don't look at soldiers straight in the face in Haiti.

After I was released from the house the soldiers made me go to, I used some of the money my cousin gave me to go to Gonaives and then on to Cap Haitien. Actually, after I left the soldiers' house someone gave me a ride to the bus station. The person who gave me a ride to the bus station waved at me, I guess because he saw me limping, and asked where I was going. But he waved at

me so that's why I was less hesitant to let him give me a ride. And I was having trouble walking and wanted to get out of the area with the soldiers who'd just beat me. I think he was probably sympathetic to the people's movement because he tried to help me, but I was afraid to talk to him about what had happened to me since I didn't know whether he was a good samaritan or not. I thought too he might have been a journaiist because we trust the journalists, they've helped us before. It cost me $6 to go to Gonaives and then another $6 to go to Cap Haitien.

When I arrived in Cap Haitien, my mother and the people in my neighborhood told me that I could not go home because the military had been by my home regularly to try to find me. Some people saw me after I had been beaten by the soldiers in Haiti. For example, * * * members of my group in hiding with me, saw how I had been beaten. So my friends hid me in the countryside and would come to check on me. I was in hiding with * * * we had supported in the elections, from the * * *. I knew him because I voted for him and we voted out * * *. He was on the same boat with me when I left Haiti a second time after the coup.

I stayed in hiding with * * * and my mother would sometimes visit me at night to sneak me food. She told me on one of her visits that the military had searched my house and told me to leave Haiti and never to return while these military people were there. My mother was very upset. At this point my friends found me another boat and I fled again on December 2, 1991. On December 3, 1991 I was picked up by the Coast Guard.

This time I was taken to Guantanamo where I explained that this was the second time that I had fled Haiti. I was very scared and shaken up since this was the second time; I was afraid that I would be sent back automatically, since immigration officials did not believe me the first time I left Haiti.

But the second time I was interviewed after leaving my country I was asked many more questions and I had the opportunity to say much more about why I left Haiti again. I didn't get interviewed the same day the Coast Guard picked us up. I know I had slept and showered before they questioned me. Also I was questioned not on the boat, but on land.

But at the time of my interview I was still very worried because I knew what had happened the first time and they still sent me back to Haiti and I was afraid they would do that again and I knew that my photographs had been seen in Haiti and that I would die if they sent me back. But this time it was a much, much, much longer interview. And when I was interviewed I told the persons questioning me what happened when I was returned to Haiti and how they were angry with people like me who had left the country. I was asked important questions about what happened to me after I was returned to Haiti and I had time to tell my story. That made me think of Haiti and to appreciate democracy a little more. And I was questioned more than once about what happened to me when I was returned to Haiti, even the soldiers were asking me questions.

A friend that I met at the hospital on Guantanamo, Pierre, gave me a newspaper article where I was pictured being carried by two individuals back to the Haitian authorities, this was when I was first sent back to Haiti after the coup [New York Times article, 11/21/91]. But some in the military at Guantanamo didn't seem to want the information I was giving. For example, when I received the newspaper with my picture I wanted to give it to the Immigration. But there was a military officer, a Major I think, in charge of the camp who grabbed the newspaper photo away from me and placed me in a small uncovered detention pen behind barbed wire. The major told me my signature was on this paper and I couldn't have it. I was out in the sun for about 3 hours until

the Major came back and touched my head to see how hot I was. When he realized how hot I was he released me.

I had family members who were also in Guantanamo but I wasn't allowed to go to see them. I thought I wasn't allowed visiting rights by the military because they had the photograph of me in the newspaper and they knew I wanted to send the photo and letter to Immigration. I had written a letter in French to give to Immigration and handed it to a reporter so they would take it to Immigration. I made sure no soldiers saw me when I did that. I was afraid of the soldiers for two reasons: (1) I was obsessed with seeing soldiers in Haiti and that brings you lots of fear and terror because you feel like you are about to live through the same thing again and (2) I thought they would turn me back to Haiti again.

Right now, I have three cousins, who were in the MPP with me, hiding in the countryside in Haiti because they are afraid they will be killed by the military. I am certain that if I am returned to Haiti again, I will be recognized and killed. I would rather take my own life than be returned to a certain death.

There is no safe area in Haiti for me to return to. I was photographed several times after my return in Port-au-Prince and I'm sure I'd be killed.

It wasn't my idea to come back here, to leave Haiti, but because I was sent back to Haiti the first time, I had to leave again. I was looking to go to some area like Cuba. All of this is because I'm afraid I'll be killed in Haiti. As long as we have the kind of regime we have in Haiti now I can't go back. The army would have to be under control and the constitutional rights of the people respected.

I wasn't involved in politics before Aristide. Only during Aristide's time I saw what benefit people could have with government, then I got involved.

I am going to school full time now in Miami, to learn English. I love school. I go to classes at the Notre Dame Church here. My teacher is Roger. I really want to learn. If you don't go to school you can do drugs and bad things and I don't want that.

I hereby swear under penalty of perjury that the foregoing is true and correct.

/s/ Luma Dukens
LUMA DUKENS

SWORN TO AND SUBSCRIBED BEFORE ME on this 23rd day of March, 1992.

/s/ [Illegible]
Notary Public

PLAINTIFFS' EXHIBIT NO. 60

U.S. DEPARTMENT OF JUSTICE

Immigration and Naturalization Service
425 Eye Street, N.W.
Washington, D.C. 20536

Feb. 27, 1992

Robert D. Evans, Esq.
American Bar Association
Director, Governmental Affairs Office
1800 M Street, N.W.
Washington, D.C. 20036

Dear Mr. Evans:

Thank you for your letter to Attorney General William Barr suggesting that temporary protected status be extended to nationals of Haiti who are now within the United States. You also expressed concern for the welfare of those seeking to enter the United States in order to flee the strife in Haiti. Your letter has been referred to my office for response.

As you note, a temporary protected status designation for Haiti would not affect Haitians not already admitted to the United States, including those now aboard Coast Guard cutters or at the Navy base in Guantanamo Bay. Congress admonished in section 244A(c)(5) of the Immigration and Nationality Act that section 244A must not "be construed as authorizing an alien to apply for admission to, or to be admitted to, the United States in order to apply for temporary protected status."

You recommend, however, that the Attorney General extend temporary protected status to Haitian nationals already within the United States. Your letter suggests that, because El Salvador, Kuwait, Liberia, Lebanon, and Somalia have been designated within the Temporary Protected Status program, such a designation is also appro-

priate for Haiti. Temporary protected status, however, is not a remedy designed to address every problem, or even every danger. Rather, it is designed for ongoing armed conflicts, natural disasters, and extraordinary and temporary conditions of such nature and magnitude as to make it *generally* impossible to return to a country in safety. Although reasonable people may differ about whether such conditions exist in a given place and time, the designation of each country to which you refer in your letter was made for reasons that have not been found to exist in Haiti.

Congress itself designated El Salvador in section 303 of the Immigration Act of 1990. The Attorney General extended temporary protected status to nationals of Kuwait, Liberia, and Lebanon in response to conditions in those countries and the "strong urging" of a House-Senate Conference Committee. Safe return to Kuwait was impeded by the Iraqi occupation and the subsequent military conflict. Liberia has been ravaged by a civil war that has left tens of thousands dead and has driven approximately 600,000 to flee the country. Large parts of Lebanon lie outside government control, and civilians continue to fall victim to artillery and aerial attacks, bombings, sniping, abductions, summary executions, and assassinations. Though not specifically recommended by Congress, the designation of Somalia followed severe and worsening strife in that country as a result of its civil war. Since January of 1991, the violence that began in Mogadishu has spread throughout Somalia, leaving approximately 20,000 dead. Most foreign embassies there, including that of the United States, have closed.

Conditions in Haiti, though serious enough to warrant all appropriate assistance from the United States, have not been found to warrant temporary protected status. The Attorney General is required by law to consult with other appropriate agencies before making temporary protected status designations. Since the September 30, 1991 coup, the Department of Justice has consulted frequently

with the Department of State about conditions in Haiti. State Department personnel, both in the United States and at the embassy in Port-au-Prince, have attempted to stay abreast of events in Haiti, and particularly to investigate any reports of persecution that might be relevant to the question whether people can be returned safely to Haiti. The information provided by the Department of State indicates that those persons who are not refugees can be returned to Haiti in safety. Since the coup, there have been no substantiated reports that persons returned to Haiti by the United States have been persecuted by Haitian authorities. United States Embassy officials have tried and failed to produce confirmation of reports to the contrary. In fact, conditions may be improving. On February 24, 1992, exiled President Jean-Bertrand Aristide and his Prime Minister-designate Rene Theodore agreed to a political plan to restore an elected government and to arrange for the President's return to Haiti.

After careful and continuing consideration of this evidence, the Attorney General has concluded that conditions in Haiti do not prevent the safe return of persons who are not refugees. Under such circumstances, section 244A does not permit a designation of temporary protected status. Of course, should conditions in Haiti change materially, or should there appear new material evidence of current conditions in Haiti, the Attorney General would consider such changed circumstances or new evidence as appropriate.

Unlike the Temporary Protected Status program, however, the asylum process is designed to protect those people who, for reasons peculiar to themselves or to defined groups of which they are members, cannot be returned to their home country in safety. The United States has acted diligently to ensure that this benefit is provided to every eligible Haitian. All persons rescued on the high seas by United States authorities are afforded an asylum pre-screening interview designed to identify those who

have a credible fear of returning to Haiti because of a serious danger or threat of harm on account of race, religion, nationality, membership in a particular social group, or political opinion. The proof necessary to establish a credible fear of returning is considerably less than that necessary to establish refugee status. Only those who fail to make this minimal showing are returned to Haiti. Those who establish a credible fear of returning—a group numbering in the thousands so far—are eligible for transfer to the United States to pursue thier asylum claims. The credible fear test ensures that no genuine refugee will be involuntarily returned to Haiti.

I hope that this information will reassure you that Haitian nationals within this country and those rescued on the high seas are receiving fair and humane treatment under our immigration laws.

Sincerely,

/s/ Grover Joseph Rees III
GROVER JOSEPH REES III
General Counsel

PLAINTIFFS' EXHIBIT NO. 84

DECLARATION OF ROBERT RUBIN

I, Robert Rubin, hereby declare:

1. I am one of plaintiffs' counsel in this action. On May 25, 1992, I received a telephone call from Mr. Remy who is a member of the plaintiff class certified by this court. I know Mr. Remy's real name but choose not to use it due to his fear of retribution. I had personally counselled Mr. Remy during plaintiffs' counsel's stay at Guantanamo Bay on March 30-31, 1992, authorized pursuant to this court's temporary restraining order.

2. Mr. Remy was calling me from somewhere in Haiti although he was afraid to say exactly where he was. He had been repatriated from Guantanamo on or about April 28, 1992, after refusing to undergo a second uncounselled asylum screening. He had been found by the Immigration and Naturalization Service to have a "credible fear of persecution" based upon his fear of the military soldiers who had raised his house and sought to punish him for his open support of former President Aristide. These soldiers knew of Mr. Remy's prominent role in pro-Aristide organizations including the National Front for Change and Democracy (FNCD).

3. During our telephone conversation, Mr. Remy stated that he has been in hiding in the mountains since he was forcibly returned to Haiti. He said that it is not safe for him to be in Port-au-Prince and that, during this past week, many people were killed in Port-au-Prince.

4. Mr. Remy stated: "My life is really in danger. The killers are very hungry."

5. I described to Mr. Remy the provisions of the May 24, 1992 Executive Order "Interdiction Of Illegal Aliens." In particular, I told him about its reference to the availability of refugee processing at the U.S. Embassy in Port-au-Prince. He responded: "It is not safe for me to go to the Embassy." He added that that is the reason why he

has remained in hiding in the mountains outside the city. He is hopeful of evading detection by the military and is waiting for another opportunity to flee Haiti.

6. I also advised Mr. Remy that, under the new Executive Order, if he fled Haiti again, the fact that he has a credible fear of persecution might not stop the Coast Guard from returning his boat to Haiti. He expressed distress upon learning this fact because this new procedure closes an avenue of escape from the persecution he confronts in Haiti.

7. On May 27, 1992, Mr. Remy called me again. He sounded even more desperate as he stated: "The military knows that I am back in the country. I have to keep moving to stay alive." Mr. Remy also reiterated: "I have no guarantee of safety at the U.S. Embassy so I cannot go there. Please do what you can for me."

I declare under penalty of perjury that the foregoing is true and correct.

May 27, 1992
San Francisco, California

/s/ Robert Rubin
ROBERT RUBIN

PLAINTIFFS' EXHIBIT NO. 85

DECLARATION OF ELLIOT SCHRAGE

I affirm under penalty of perjury that the following is true and correct to the best of my knowledge.

1. My name is Elliot Schrage. I am a lawyer and consultant to a number of human rights organizations, including the Lawyers Committee For Human Rights, Helsinki Watch, and the Robert F. Kennedy Memorial Human Rights Center.

2. From May 1 to 10, 1992, I was a member of a Lawyers Committee delegation investigating the status of human rights in Haiti since the coup of September 30, 1991. We were also following up on previous Lawyers Committee reports on Haiti, including but not limited to "Paper Laws, Steel Bayonets: Breakdown of the Rule of Law in Haiti", December, 1990. This was my fourth trip to Haiti since 1988.

3. On the morning of Sunday, May 10, 1992, a Haitian man arrived at my hotel in Petion-Ville with his left arm wrapped in bandages. I know his name, but do not reveal it here because he is concerned for his safety if his identity should become known to the Haitian authorities. I am aware that this man is a named plaintiff in *Haitian Centers Council v. McNary*. For the purposes of this declaration, I shall call this Man M. Bertrand.

4. In each of my missions to Haiti over the last four years, as well as in missions to Africa and Eastern Europe, I have acquired considerable experience interviewing claimed victims of political persecution. My work requires me to make evaluations of the credibility and consistency of such claims, and I consider the ability to make a neutral, objective evaluation of credibility central to my work. Based upon my experience, I find the account given me by M. Bertrand to be internally consistent, consistent with the situation in Haiti at this time,

and credible. I did not, however, make any attempt to corroborate his account.

5. What follows is the account given to me by M. Bertrand relating to his attempt to leave Haiti, his forcible repatriation, and its consequences.

6. M. Bertrand fled Haiti in December 1991, and was picked up by the Coast Guard. In late December, M. Bertrand was found by U.S. officials on Guantanamo to have a credible fear of political persecution. On that basis, he was transferred to a section of the refugee camp on Guantanamo reserved for Haitians who had been "screened-in." Because he was told that any further evaluation of his asylum claim would take place in the United States, Mr. Bertrand refused to submit to a second asylum screening interview on Guantanamo, along with many other Haitian refugees. As a result of this refusal, M. Bertrand and other members of this group were forcibly repatriated to Haiti by the U.S. government.

7. The Coast Guard vessel transporting them left Guantanamo on April 28, 1992, and arrived at Port-au-Prince on April 29. Firehoses were used to force some of the refugees, including M. Bertrand, from the ship. He along with other refugees were fingerprinted by Haitian authorities upon their arrival.

8. The day of his arrival in Port-au-Prince, M. Bertrand went to the home of his grandmother, where he spent his first night back in Haiti. The next afternoon on April 30, at approximately 4:00 p.m., M. Bertrand encountered a man in the neighborhood whom he knew to be a member of the Haitian military forces. (Through he was not in uniform on this occasion, M. Bertrand had seen the man in uniform in the past.) This man recognized M. Bertrand, and expressed surprise at seeing him, saying, "You, you've returned here?" M. Bertrand immediately rushed away.

9. At approximately 11:00 p.m. that night, while M. Bertrand was in bed, there was a knock at the door of

his grandmother's house. His younger brother answered the door, where three men asked for M. Bertrand. M. Bertrand came to the door, where he recognized one of the three as the military man he had seen earlier in the day.

10. The three men entered the house and grabbed M. Bertrand. They threw him on the ground and beat him repeatedly. One man pistol-whipped M. Bertrand on the back of his head with the butt of his revolver. (M. Bertrand showed me the mark from the blow). M. Bertrand tried to protect himself, with his arms, but a blow from the men fractured his left arm.

11. M. Bertrand began to scream for help, and the three men ran out of his grandmother's house. Shortly thereafter, fearing for his safety if he remained, M. Bertrand also left the house. He has not returned to that house since.

12. M. Bertrand is now in hiding outside Port-au-Prince. I am aware of his approximate location, but because of his concern for his safety I choose not to reveal it here. I am able to contact M. Bertrand indirectly through a relative of his in Port-au-Prince.

13. M. Bertrand appears to sincerely fear for his life as a direct result of persecution he has encountered since his repatriation to Haiti.

14. It is my professional assessment that M. Bertrand's fear for his safety is well-founded.

Signed and sworn to this 11th day of May, 1992.

/s/ Elliot J. Schrage
ELLIOT SCHRAGE

PLAINTIFFS' EXHIBIT NO. 86

DECLARATION OF WILLIAM G. O'NEILL

I affirm under penalty of perjury that the following is true and correct to the best of my knowledge.

1. My name is William G. O'Neill. I am a lawyer and the Deputy Director of the Lawyers Committee for Human Rights. I speak fluent French and understand Creole. I reside in Brooklyn.

2. From May 1 to 10, 1992 I was the leader of a Lawyers Committee delegation investigating the status of human rights in Haiti since the coup of September 30, 1991. This was my eighth trip to Haiti since I first visited in 1974. Our delegation met with about 100 individuals during our stay.

3. I have interviewed dozens of Haitian applicants for political asylum and hundreds of Haitians who claim to be victims of human rights abuses. I have had extensive experience in analyzing and assessing the credibility of claims for asylum and refugee status made by Haitians and others. I was co-author of a 200-page Lawyers Committee report on Haiti entitled "Paper Laws, Steel Bayonets: Breakdown of the Rule of Law in Haiti," December 1990.

4. On Friday evening, May 8, I met with Dudley Sipprelle, Consul General at the United States Embassy in Port au Prince, Haiti. Mr. Sipprelle told me that since the consulate began refugee processing in Haiti in January there had been 145 applications, representing 190 people (sometimes children are processed with their parents, or families are processed together). Of these applications, eleven have been approved as refugees, twenty-five have been rejected, and the remainder are still pending. Though the Haitians apply at the consulate, which is run by the Department of State, the refugee applications must be adjudicated by a "circuit-riding" INS official based in Mexico City who is also responsible for applications made in Haiti.

5. During my trip, a colleague, Elliot Schrage, and I spoke to three Haitians who had applied for refugee status but had been turned down. My professional assessment based on my experience in Haiti and my work evaluating claims of politcal persecution is that all three had extremely strong claims for refugee status. All three described their interviews as interrogations, adversarial and unfriendly processes in which they were pumped for information about ousted President Jean-Bertrand Aristide and his supporters. All three applicants expressed concern that they had entrusted confidential information on their activities and whereabouts to strangers, and that if this information somehow found its way into the wrong hands their lives would be in danger.

6. Two of the three applicants had been bodyguards of Aristide himself, and they were with the President the night of the coup. The two men came to the attention of the U.S. consulate only through the dedicated efforts of foreign priests based in Haiti. The bodyguards were interviewed by two different three-person panels, and both received form letters written in French, not Creole, suggesting the grounds for their denials: a box marked "212(a)(1)(A)." Mr. Sipprelle admitted that to consider this French-language form letter meaningful notice would be absurd. Mr. Sipprelle went on to explain that this citation meant the two applicants had been approved as refugees pending a medical examination; Subsequent medical tests indicated, however, that the two men were HIV positive. The men were not told of their test results, nor that they were entitled to request another medical test.

7. The third applicant denied refugee status was interviewed by Mr. Schrage.

8. Both the U.S. Consulate, where refugee applications are processed, and the U.S. Embassy in Port-au-Prince are seen as forbidding, potentially dangerous places for Haitians. The U.S. Embassy is next to the

National Parliament, a heavily militarized part of the capital. The Consulate is near the University, another area frequently filled with soldiers. Both compounds have high walls around them, and the U.S. government has hired numerous Haitian security guards to patrol the area around the Embassy and the Consulate. To monitor Haitian visitors to the Embassy and Consulate is easy for the Haitian authorities, and thus few Haitians dare risk a visit for the slim chance at refugee status. Without a high-level introduction, few people even try.

9. The general human rights situation in Haiti in early May was a nightmare, the worst conditions I have ever witnessed in that country. Our delegation documented numerous cases of arbitrary arrest, illegal detention, mistreatment of detainees that includes torture, a severe crackdown on freedom of expression, censorship of the press, bans on free association, and pervasive violations of most basic human rights. The soldiers indulge in these abuses with lawless impunity, and as far as I know not one soldier has been investigated or prosecuted for the thousands of human rights violations that have occurred in Haiti since the coup.

10. One person I spoke with was a nun, about thirty years old, stocky with a dark complexion. She was illegally arrested on April 27th, just days before our arrival, for possessing calendars with Aristide's picture, and held until May 2nd; I met her on May 4th at the place where she is hiding. During her detention this nun was given little food and almost no water, and she was held in horrible conditions in an overcrowded cell. She was verbally abused and threatened by the guards, and when another nun came to bring her necessary medication one day, the second nun was also arrested. The nun I spoke to was released only after the intervention of several bishops, but she remains terrified and cannot return to her convent in the countryside.

11. A second person I spoke with was a lawyer in the southwest, in a town called Les Cayes. This lawyer

had been active in training paralegals and teaching citizens about basic legal rights before the coup, and was eventually named Director of Education for the region by President Aristide. Shortly after the coup the lawyer was forced to flee into hiding, and he returned home to test the water only several weeks ago. Upon his return the lawyer resumed teaching a course in Haitian history at the local high school. Shortly before I arrived in Haiti he re-hung a sign reading "Avocat" (lawyer) outside his door. On Tuesday, May 5, two soldiers on motorcycles, armed with sub-machine guns, came to the lawyer's house and confronted him. Soon more soldiers took up positions on the street. After a tense stand-off, the soldiers left, threatening to return. When I visited this lawyer on Saturday, May 9, he had not been outside his house since the incident. Throughout our conversation he remained very agitated, and his wife watched the front gate anxiously for signs of trouble.

12. A third person I met was a reporter for the Creole-language Voice of America radio station, a brash young man of twenty-five. This reporter fled his home because twice in December soldiers had come looking for him, and he received personal death threats over the telephone. After leaving Haiti I heard from a credible source there that this journalist was covering a demonstration on May 22 at a girls' high school in Port-au-Prince when soldiers arrived, destroyed his equipment, and beat him severely.

13. During this trip to Haiti I noticed many differences from earlier trips. Though torture and murder are not as common as they were in the immediate aftermath of the coup, the authorities continue to kill some people, and they use many tactics to intimidate and threaten most citizens. Beneath a veneer of normalcy is enormous fear, a gripping terror that moved Haitians to behavior I have never witnessed in previous visits to this country. People are afraid to talk on the telephone

and to give exact locations. People are far more anxious about documents—one priest I spoke to now routinely memorizes and destroys important papers. People now frequently change their place of rest, sleeping one place tonight, another tomorrow. To locate people now often requires passing through two or three friends who act as intermediaries. On the roads there are far more military checkpoints than ever before, and the soldiers who staff them are much more assertive in demanding official papers. Haiti's human rights nightmare is far from over.

Signed and sworn to this 26th day of May, 1992.

/s/ William G. O'Neill
WILLIAM G. O'NEILL

PLAINTIFFS' EXHIBIT NO. 87

DECLARATION OF RONALD AUBOURG

I affirm under penalty of perjury that the following is true and correct to the best of my knowledge.

1. My name is Ronald Aubourg. I am the Administrative Assistant of the National Coalition for Haitian Refugees, a plaintiff in this case, which is located in Manhattan. I was born in Haiti but moved to the United States in 1977. I have returned to Haiti several times since then, and I am fluent in English, Creole, and French.

2. From May 14 to 18, 1992 I was in Haiti visiting relatives and investigating the status of human rights, pursuant to my responsibilities at the Coalition and our obligations as counsel to a number of Haitians who have been forcibly repatriated in recent weeks.

3. It is my professional assessment that the human rights conditions in Haiti are horrible. I lived in Haiti for two years, from 1988 to 1990, under the Manigat, Namphy, and Avril regimes. Current conditions in Haiti are far worse than they were under these repressive regimes. Today, the lives of thousands of young Haitians, particularly those in urban areas, are in grave danger from systemic murder and torture by the military authorities. The Haitian soldiers do not hesitate to murder or do great bodily harm to any citizen, whether one is actively opposing the military dictatorship or merely finds oneself in the wrong place at the wrong time.

4. To expect Haitians who fear political persecution to apply for refugee status at the U.S. Embassy or Consulate in Port-au-Prince is ludicrous. People who fear political persecution are in hiding, mostly in the countryside, and they are in hiding because the military is actively looking for them. To enter the capital city from the countryside, a refugee must pass through numerous military roadblocks on the roads into Port-au-Prince. On

my recent trip I passed through one such roadblock, so I know that they are maintained by armed soldiers who search cars for weapons, political materials, and especially dissidents in hiding. It is common knowledge in Haiti that the soldiers frequently ask for identification, and if they recognize someone as wanted by the military they will immediately handcuff and arrest that person. Of course, anyone repatriated from Guantanamo has been photographed and fingerprinted upon re-entry, and so there identities are already known to the military. Young adults who have been repatriated are particularly at risk.

5. If a refugee is fortunate enough to pass through the roadblocks outside Port-au-Prince, he will then have to make his way through the heavily militarized city to the Embassy or the Consulate. The Embassy is downtown, where there are many soldiers, and the Consulate is a few meters from an Army barracks where significant violence occurred after the coup.

6. The U.S. Embassy employs members of the Haitian Police to guard the Consulate compound, however, and a refugee arriving at the compound must confront these police first. These police will ask the refugee to identify himself, give his reason for coming to the Embassy, and state his place of residence. Because these officers work for the Haitian Police, they naturally report to their superior officers. Any refugee seeking asylum is extremely vulnerable to immediate reprisals by the police, who work closely with the army and other military authorities. It is considered fatally foolish in Port-au-Prince to introduce oneself to the Haitian authorities as a refugee from political persecution.

7. Violence was pervasive in Haiti during my entire stay. I arrived in Port-au-Prince Thursday afternoon, May 14th, and stayed in the neighborhood of Lalue. Throughout the night I heard sporadic gunfire in the area, and the next morning I learned that three or four people had been killed by the military in this area alone.

8. The next morning, Friday May 15th, practically all of the 400-500 secondary school students at Lycee Petion began a peaceful protest, calling for the resignation of the dictators and the return of President Aristide. A friend whom I find credible was in the neighborhood, and he told me that soldiers surrounded the school and closed it off from a block away. I heard broadcasts on the private station Radio Tropical report that the soldiers viciously beat the students. The radio also reported that some students tried to lock themselves in classrooms for protection, but six or seven were arrested and taken away. That night the city was extremely tense, anticipating more military oppression, and the streets were deserted.

9. On Saturday the city remained eerily quiet, as people hid indoors. I went out to another area in metropolitan Port-au-Prince, called La Plain. Soldiers were out everywhere, holding their Uzis and M-16s as if they were ready to fire. That day I personally witnessed a number of brutal acts by the military. I saw one young man being severely beaten by a uniformed policeman with a gun. I drove slowly past as the policeman slapped the man in the face and punched him repeatedly.

10. Later I stopped about twenty feet from two armed men in civilian clothes who were beating a bearded man, perhaps thirty years old, who was screaming and bleeding from his nose. The victim was leaning against a coconut tree, and his clothes were ripped. It appeared that his attempts to block the blows of the soldiers had angered them, inciting them to more violence.

11. Still on Saturday, I saw from afar that a third man was being beaten by a member of the Haitian military wearing civilian clothes. I came closer, and heard the short, light-skinned victim, a teenager with reddish hair, crying and screaming that he hadn't done anything. It was a terrible scene.

12. On Sunday I did not go out. On Monday Port-au-Prince was terrorized again. A plane dropped leaflets over the city with pictures of Aristide and calls to the Haitian people to mobilize. Soldiers came out in large numbers, and the people knew that brutal violence would follow. I went to Carrefour-feuilles, one of the places where leaflets were dropped and a neighborhood famous for its resistance to the coup and its support for Aristide. One of the first things I noticed when I arrived at Carrefour-feuilles was graffiti visible on many walls, proclaiming in red "Up with Aristide! Down with the military!". As I was leaving Carrefour-feuilles, I saw two trucks full of soldiers coming towards me. I moved out of the way, but soon after the trucks passed 50-70 heavily armed soldiers jumped down and began beating anyone on the street with their rifle butts. Anyone in the path of the soldiers was savagely attacked, especially teenagers and young adults.

13. Also on Monday I finally succeeded in meeting with a refugee who has been identified in other declarations as "M. Bertrand," a named plaintiff in *Haitian Centers Council v. McNary*. I had met M. Bertrand when I joined the plaintiff organizations' delegation to Guantanamo Bay Naval Base in late March.

14. Though screened-in, M. Bertrand was forcibly repatriated by the United States and attacked by soldiers within 48 hours of his return. Since then, he has been in hiding. M. Bertrand told me that his fears had increased significantly since he met with an American lawyer in Haiti in early May. M. Bertrand came to see me accompanied by two large men, who he described as witnesses should anything happen to him. M. Bertrand said that conditions in Haiti had worsened substantially and that tensions were extremely high. He very much feared for his life. It is his view, however, that without high-level intervention on his behalf, to approach the

U.S. Consulate and identify himself to the Haitian Police stationed there would be suicide.

Signed and sworn to this 26 day of May, 1992.

/s/ Ronald Aubourg
RONALD AUBOURG

PLAINTIFFS' EXHIBIT NO. 88

DEPOSITION OF SCOTT WILLIAM BUSBY,
MAY 6, 1992

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[34] A. I would say probably about a third.

Q. Did that average vary over the period of those approximately three weeks?

A. Yes, it did.

Q. Can you, as before, can you give me a chronological breakdown of what the average screen in rates were at the appropriate times?

A. The first few days I was there, after April 13, the rates were between five and 10 percent.

Q. They changed thereafter?

A. Yes, they did.

Q. What happened?

A. On approximately April 18 the rates went up to 20 to 25 percent for several days.

Q. Then?

A. I am not as familiar with the daily rates after that, but they ranged between 30 and 50 percent, on a daily basis.

Q. These screen in rates are statistics that are maintained by the Immigration Service; is that correct?

PLAINTIFFS' EXHIBIT NO. 89

DEPOSITION OF GUNTHER O. WAGNER
MAY 5, 1992

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[106] BY MR. GUTTENTAG:

Q. Did you go to people's home?

A. Yes.

Q. Approximately how many?

A. Numerous.

Q. Ten?

A. More than ten.

Q. Half of the persons you talked to

A. A good 450 or 500 homes, easy.

Q Those persons, who you did not talk to in their homes, where would you talk to them?

A. On the front steps of their house, in the street.

Q. You didn't have any sort of private room set up where you could interview people?

A. No.

Q. I take it that your presence in the village or town would be fairly obvious based upon your appearance; is that fair?

A. It is obvious, I was perhaps the only white [107] man in the village. But, that does not necessarily mean that the whole village came to the point where I talked to the individual.

Q. Do you have a copy of the report based on your December visit?

A. Yes, I do.

Q. When was that report finished?

A. The end of December.

Q. You sent it to Washington; is that right?

A. That's correct.

Q. You maintained a copy for yourself; is that correct?

A. That's correct.

Q. Did a copy go anywhere else?
A. No.
Q. What happened to the copy that went to Washington, if you know?
A. I have no idea.
Q. Did you ever hear anything about it?
A. No.

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[130] Q. Did you talk to anyone who was in hiding?
A. These are the ones I am referring to.
Q. Were any of those persons in hiding?
A. That is what they claimed that they were in hiding.
Q. The fact that they talked to you in public demonstrated their claims were not credible?
A. That's correct. Because the individual is out in the street, as far as I am concerned, he is not hiding.
Q. I may have asked you this earlier in which case I apologize, other than your duties in relation to your debriefing at GITMO and your visits to Haiti, your normal job at the INS does not require you to make credibility determinations; is that correct?
A. This is the first time, yes, that I was called upon for this, this type of duty, to debrief, to verify allegations of problems in a given country, yes.

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[141] Q. Again, it is those people who you are able to contact in one way or another while you were in Haiti; is that right?
A. That's correct
Q. Not those people who refuse to speak with you or didn't come forward to contact you in some way; is that right?
A. Yes. How can I recollect that I remember anybody who refused to speak to me?
Q. You wouldn't know if they refused to go where you were?

A. It is conceivable that somebody didn't come forward, yes.

(A recess was taken.)

(The record was read as requested.)

BY MR. GUTTENTAG:

Q. Mr. Wagner, you never spoke with any persons who initially had been screened in at Guantanamo; is that right?
A. Yes.
Q. So nothing in your report is relevant to the fate of the screened in persons who might have [142] not been screened in to Haiti; is that right?
A. That's correct.
Q. The third report that you prepared, based on your third visit to Haiti, you have completed that; is that correct?
A. Yes, sir.
Q. That has been sent to Washington as well?
A. That's correct.
Q. Do you have a copy?
A. I have a copy.
Q. Do you know whether anyone else has a copy?
A. The only copies I made for my office and for Washington.
Q. Do you know what happened with the copy that you sent to Washington?
A. As I said in the previous two reports, I have no idea what the disposition is of these reports.
Q. Did you ever receive any feedback on the report?
A. Not from the last one, no.

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PLAINTIFFS' EXHIBIT NO. 94

DECLARATION OF ELLIOT J. SCHRAGE

I affirm under penalty of perjury that the following is true and correct to the best of my knowledge.

1. My name is Elliot J. Schrage. I am a lawyer and have served as a consultant to a number of human rights organizations, including the Lawyers Committee for Human Rights, Helsinki Watch, and the Robert F. Kennedy Memorial Human Rights Center.

2. From May 1 to 10, 1992, I was a member of a Lawyers Committee delegation investigating the status of human rights in Haiti since the coup of September 30, 1991. We were also following up on previous Lawyers Committee reports on Haiti, including but not limited to "Paper Laws, Steel Bayonets: Breakdown of the Rule of Law in Haiti," December, 1990. This was my fourth trip to Haiti since 1988.

3. On May 10th, I interviewed a Haitian man who is in hiding and has been since shortly after the coup. I know his name, but do not reveal it here because he is concerned for his safety should his identity become known to the Haitian authorities. For the purposes of this declaration, I shall call this man Mr. H.

4. In each of my missions to Haiti over the last four years, as well as in missions to Africa and Eastern Europe, I have acquired considerable experience interviewing claimed victims of political persecution. My work requires me to make evaluations of the credibility and consistency of such claims, and I consider the ability to make a neutral, objective evaluation of credibility central to my work. Based upon my experience, I find the account given to me by Mr. H to be internally consistent, consistent with the situation in Haiti at this time, and credible. I did not, however, make any independent effort to corroborate his account.

5. Mr. H was active in a number of community groups in and around Cap Haitien, and had organized literacy projects in the region. After the coup, the police raided the place where Mr. H was staying and broke up a meeting being held there. The authorities arrested and beat Mr. H, and held him in detention for a number of days. Upon his release, he fled into hiding.

6. Mr. told me that he had applied to the U.S. mission in Haiti for refugee status, with the assistance of a foreign missionary in Haiti. Mr. H told me that his application was denied on the grounds that he had failed to demonstrate a fear of political persecution.

7. Mr. H appears to genuinely fear for his life because of political persecution since the coup. In my professional judgment, Mr. H's fear for his safety is well-founded.

8. In addition to speaking with Mr. H, I spoke to several other Haitians who had applied or who were preparing to apply for refugee status. All undertook this risky process only because they were assisted by prominent Haitians or foreigners in Haiti. In my professional assessment, any Haitian in hiding and fearing political persecution—especially one hiding in the rural areas outside Port-au-Prince—would be risking his life by approaching the U.S. Consulate or Embassy and declaring his intention to apply for refugee status.

Signed and sworn to this 26 day of May, 1992.

/s/ Elliot J. Schrage
ELLIOT J. SCHRAGE

PLAINTIFFS' EXHIBIT NO. 95

DEPOSITION OF GROVER JOSEPH REES III

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[107] They have now given us, I am told, a list, either they have given it or we generated a computer list doing the same thing they did to generate the earlier list, and there is a list of some 180 who appear to have been noted as screened in at some point in the process and who, on the other hand, appear on some other list as having been repatriated.

Now, there are several things that could have happened in order to get you on both of those lists. One is that you could have been, as the 34 we found were, out of the original 44, you could have been just listed in a computer as screened in when you were really screened out and you were repatriated according to the rules that were followed and you were repatriated.

The second possibility—the first [108] reason was just the erroneous notation, that the person was really—we are back on the record? I'm sorry.—the person was really screened out and he was sent back, but somewhere somebody made a computer entry that said he was screened in; that is one possibility.

The second possibility is that the person really was screened in and voluntarily repatriated. The third possibility is that it is really a subset of the first possibility, which is that he or she was screened out, was not found to have a credible fear, but had a relative in the camp, a close relative on the basis of whom our family unity policy would have said we can bring that person in, and I think that in the first batch CRS was categorizing those people as screened in, and it just depends how you count those, but that would have been a mistake, I think, because we would have wanted to bring those people into the country, but it obviously wouldn't be a mistake on the order of the fourth possibility, which is that, in fact,

somebody had a credible fear of return and nevertheless was erroneously sent back to Haiti.

[109] Q This list is in addition to the 44 or 54—

A I think it is in addition. I think it would include the 44, because I think we generated it by the same principle that they generated the earlier list. It really reminded me a bit of Wheeling, West Virginia, they kept talking about different numbers, and I don't think it was anybody's fault. First we thought there were 44, then we thought there were 54, then we thought there were 80, and now we think there is 190.

As I understand, this was the only list of names that had actually been given, the first 44, so we kind of had a sense of what may turn out to be false confidence, because we checked the first 44 and we couldn't find 10 of the hard copies out of the 23,000 or so that we had, and we are still looking for those, but every one we found turned out to be in the most innocuous category.

It now appears, I have now looked at 20 hard copies, at about 30 or 40 hard copies that have been produced as a result of our search, and of those, I have looked at 20 hard copies of assessment [110] sheets who did appear to have been screened in and who do appear to have been repatriated.

Now, those could still conceivably be people who voluntarily repatriated, but they are not in that—

Q These are 20 from the first group of 40?

A No. This is out of the 190. That process is still underway, but I have been getting reports on it and I have seen 20 interview sheets that say screened in and where the person appears to have been repatriated and where there is no notation to the effect that the repatriation was voluntary.

Q How do you think these errors are happening? I understand you said particularly this first one they are erroneously entered. What is the process by which—

A Those people were correctly entered, obviously, because how we generated them was by looking at the com-

puter, and it says they were screened in. With the first batch, we found them and they said it was screened out. These appear this wasn't the mistake.

[111] Q Do you know what the mistake was at this point?

A Well, I don't, but—

Q Assuming there was a mistake.

A I don't know what the nature of the mistake was. I do know that it looks like there was a mistake with those 20 people and perhaps with more.

Q Out of the 190, there may be more?

A There could be.

Q You only reviewed 20 or 30 so far, is that right?

A I think I looked at about 40, actually.

Q How long do you think that review process will take?

A I don't know, but I think we are—it has already been a couple of weeks since we have been doing it, and it might be a couple of more weeks. I just don't honestly know.

* * * * *

[162] tested positive for HIV and who had somehow—I think you were vague about it, but the process had been shortened either because they hadn't wanted to go forward with it, they refused a second interview—I don't want to put words in your mouth.

A The process certainly was not shortened. What happened with those people was, before—again, I keep talking pre- and post- injunction, but that is how I remember these things—before the injunction, and I guess, therefore, it was in March, we learned that there were a number of people who had refused to accept a second interview, and that these people said no, we were promised we could go to Miami, and we just want to go to Miami, we don't want to talk to you anymore, and that what we did at that time was to try to conduct some education, we put together a verbal announcement which

was a precis of that memo explaining briefly, you know, what American law is about medical exclusions and saying you really do have to come talk to us, this is the same interview, in substance, that you would get if you came to the United States, but we don't want to let you into the [163] United States to have it because then you would be there and you would have a medical exclusion, and that's where we started.

Some people came forward at that point. We then made an announcement that said if you don't do this, you know, this is your chance, this is your chance to show us that you are a refugee, that you have a well-founded fear of return, and only when we know that are we going to start doing the things that we have to do to find out if you can get a parole.

If you don't wish to show us that you are a refugee, we will conclude that you are not and we will send you back to Haiti, and this announcement was made, I am told that it was published in the camp newspaper that the JTF was putting out at that point, the Sakpas, and I think that is spelled actually S-A-K-P-A-S, or something to that effect, it is a Creole spelling of what would otherwise be a French expression, and that that announcement was published substantially verbatim in that newspaper.

Then, of course, nothing happened for three weeks, and when the injunction was lifted, we [164] concentrated on interviewing the people who would come forward for interviews. When that had been done, we got back to this other issue and we learned that, rightly or wrongly, these people, through a channel of communication with the United States, wrongly, in our view, had been told that if they could wait until May 7th, that then they would have lawyers again and that we really weren't allowed to repatriate them, anyway, so we were sort of bluffing, and that we couldn't send them back to Haiti, and that what they had to do was refuse the interview. Now, whoever told them that was giving them very bad advice, and we

had to concentrate on trying to convince them that that really wasn't true.

Q Do you know who told them that?

A I have the impression that it went through the chaplain who was talking to some of the plaintiffs' lawyers, but I would be wrong.

Q Impression, or do you have any evidence of that?

A No, I have the impression, I draw the inference from the May 7th date, which was at the [165] time that the Second Circuit was going to hear the appeal.

Q But you have no evidence other than your conclusion?

A No—well, let me think. Somebody may have told somebody that it was through the chaplain, but, of course, we don't know exactly. We do know that the chaplain had been talking to the plaintiffs' lawyers, but somebody had been giving these people the very bad advice that if they could only hold out until May 7, but, obviously, that put us in an awkward position, because we didn't want—you know, if it wasn't for that factor in the equation, it was not an unreasonable inference to draw that somebody who didn't want to participate in the interview process anymore after he had been told over and over again that if you don't do this, you are going to return to Haiti, didn't really mind returning to Haiti as much as some of the other people.

We were worried that people really were going to think that we were bluffing, and if we had, for instance, after their name was called the first [166] time and turned them down, just put them on a boat to Haiti, that we might be sending back some people who, in fact, had a well-founded fear and were just mislead as to the circumstances.

So we must have made this announcement five or six times on successive days, and we did it with increasing both—we kind of emplored them to come forward for their interview. We sent Scott Busby, who was—I think it was Scott, it was either Scott or Charlie, one of the two

quality control officers, with an interpreter to the gate to talk with someone who apparently was the leader of an organized group and to try to explain this, aside from the announcements, and this person said no, we know if we can just wait until May 7th, we will have lawyers, and I said no, that is really not true, this is a prediction, but it's not likely to happen and you will be repatriated if you don't come forward for this interview. So I know that at least that one encounter at the gate happened.

There were also several announcements. Finally, after at least three or four days of this, [167] they were moved into—to the hangar area and told again—

Q The 88?

A The 89, actually at that point, plus nine people who were family members who did not themselves have HIV, but who were only—but who did not have a credible fear and were only there because of their family member, those 98 people were brought to the hangar area, and the announcement was made again, we had six teams there ready to interview anybody that wanted to be interviewed, I believe they were held there for a day, and then the next morning they were put on a bus, an announcement was made on the bus that this is really it, you can still be interviewed, even—you know, you can all be interviewed right now, we are going to the boat and you are going back to Haiti, but if you would prefer to have an interview, we will plug you right back into the process, and I am told by someone who was there that they cheered when they were told they were going back to Haiti.

Q Who told you that?

[168] A Jennifer Barnes, my lawyer who was there and who had dictated the content of the announcement, and she said—obviously, she doesn't understand Creole, but she was asked by—she asked one of the interpreters who was there what did they just say, and he said they are cheering because they are going back to Haiti. Then each one was asked as he got—he or she got off the bus

on the way to the boat, are you sure that you don't want an interview? You are getting on the boat to go back to Haiti, but if you would like to have an interview, you can have one. One person said he did after all want an interview and he was sent back to the camp.

Q Do you know who that was?

A I don't know his name, but one did, so that is why it went down from 89 to 88, and the other 88 were put on the boat.

Q You can get me his name, I presume?

A I think so.

Q Now, did they—when they protested this, did they say they wanted lawyers before they went through a second interview?

[169] A I didn't hear that that was said. I think that they said that after May 7th they would have lawyers.

Q Effectively saying they wanted lawyers, in that sense?

MR. BOMBAUGH: I'm going to object to the characterization.

THE WITNESS: I don't know.

MR. RATNER: Withdraw it.

BY MR. RATNER:

Q Before getting them onto the bus, are you aware that any threats of force had to be used to get them out to the bus?

A I am aware that—I've talked to people who were there who said nothing like that happened.

Q Did you ask about that?

A I asked about how it happened, and I was told that they went voluntarily. Obviously, it had been anticipated that that might happen, because here are people who don't want to come forward for the interviews and, in fact, my people who were there were surprised that everyone went forward to get on [170] buses and to get on boats and things, even though they were unwilling to

go forward for the interview, but, yes, I was affirmatively told, I don't think I even had to ask, I was told they all went willingly, and obviously the big surprise was the cheering on the bus.

Q And they were all loaded onto the same Coast Guard cutter, as far as you know?

A That's right, yes.

Q Have you ever heard of the Association of Haitian Political Refugees?

A I have not. I may have seen a screening sheet or somebody said they belonged to it, but the name doesn't ring a bell right now.

Q Was there any difficulty that you heard of in having them depart the boat when they arrived in Haiti?

A I received an unclassified cable that I assume I can talk about—

MR. BOMBAUGH: Sure.

THE WITNESS: —from the Coast Guard saying that when they got there, about 60 of them got [171] off, and then the remaining 30 or so said that they didn't want to get off and that they had been told they were going to Miami and that they would rather die on the boat than go back to Haiti, and that several of those people were then taken off, physically removed, and that the rest of them went voluntarily.

Obviously, I did my best to recheck at that point the story that I had been given for any suggestion that anyone could at any time have told them that they were going back to—that they were going to Miami, and I must have checked it five different ways, and everyone —you know, I am dealing with people that I trust, and they say it is absolutely impossible; what they could mean, the only possible germ of truth is that they were reasserting that they at some earlier point in the process had been told they were going to Miami, but they were clearly told they were going to Haiti, and, you know, the lawyer who I had on the bus went so far as to go back and talk to the two Creole speaking people who were on

the bus, the person making the announcement [172] and the person who she had talked to who was one of our interpreters, to make sure that there was no possible ambiguity about it and that her announcement, the one that she had given them, had in fact been given, and she was told again, yes, it was, there was no funny business, they were told that they were going back to Haiti.

Q Did you hear anything about a threat to use fire hoses to get them off the boat when they came to Haiti?

A That was in the Coast Guard cutter, in the Coast Guard cable, and it is the only thing I know about, it is that fire—you have undoubtedly seen it, it says that fire hoses were charged. I don't know—it doesn't say a threat was made, but it said that fire hoses were charged.

Q Are you familiar with what I would like to refer to as a flowchart for how to treat people with HIV-positive on Guantanamo?

A I have not seen a flowchart. It is not out of the question that somebody made one up.

Q Let me see if I have one.

PLAINTIFFS' EXHIBIT NO. 105

OFFICE OF THE

UNITED NATIONS HIGH COMMISSIONER

FOR REFUGEES

HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS

under the 1951 Convention and the 1967 Protocol
relating to the Status of Refugees

Geneva, September 1979

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18. The above mentioned Resolution 428(V) and the Statute of the High Commissioner's Office call for co-operation between Governments and the High Commissioner's Office in dealing with refugee problems. The High Commissioner is designated as the authority charged with providing international protection to refugees, and is required *inter alia* to promote the conclusion and ratification of international conventions for the protection of refugees, and to supervise their application.

19. Such co-operation, combined with his supervisory function, forms the basis for the High Commissioner's fundamental interest in the process of determining refugee status under the 1951 Convention and the 1967 Protocol. The part played by the High Commissioner is reflected, to varying degrees, in the procedures for the determination of refugee status established by a number of Governments.

F. Regional instruments relating to refugees

20. In addition to the 1951 Convention and the 1967 Protocol, and the Statute of the Office of the United Nations High Commissioner for Refugees, there are a number of regional agreements, conventions and other instruments relating to refugees, particularly in Africa, the Americas and Europe. These regional instruments deal with such matters as the granting of asylum, travel documents and travel facilities, etc. Some also contain a definition of the term "refugee", or of persons entitled to asylum.

21. In Latin America, the problem of diplomatic and territorial asylum is dealt with in a number of regional instruments including the Treaty on International Penal Law, (Montevideo, 1889); the Agreement on Extradition, (Caracas, 1911); the Convention on Asylum, (Havana, 1928); the Convention on Political Asylum, (Montevideo, 1933); the Convention on Diplomatic Asylum, (Caracus, 1954); and the Convention on Territorial Asylum (Caracus, 1954).

22. A more recent regional instrument is the Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted by the Assembly of Heads of State and Government of the Organization of African Unity on 10 September 1969. This Convention contains a definition of the term "refugee", consisting of two parts; the first part is identical with the definition in the 1967 Protocol (i.e. the definition in the 1951 Convention without the dateline or geographic limitation). The second part applies the term "refugee" to:

> "every person who, owing to external agression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality".

23. The present Handbook deals only with the determination of refugee status under the two international instruments of universal scope: the 1951 Convention and the 1967 Protocol.

G. Asylum and the treatment of refugees

24. The Handbook does not deal with questions closely related to the determination of refugee status e.g. the granting of asylum to refugees or the legal treatment of refugees after they have been recognized as such.

25. Although there are references to asylum in the Final Act of the Conference of Plenipotentiaries as well as in the Preamble to the Convention, the granting of asylum is not dealt with in the 1951 Convention or the 1967 Protocol. The High Commissioner has always pleaded for

a generous asylum policy in the spirit of the Universal Declaration of Human Rights and the Declaration on Territorial Asylum, adopted by the General Assembly of the United Nations on 10 December 1948 and on 14 December 1967 respectively.

26. With respect to the treatment within the territory of States, this is regulated as regards refugees by the main provisions of the 1951 Convention and 1967 Protocol (see paragraph 12(ii) above). Furthermore, attention should be drawn to Recommendation E contained in the Final Act of the Conference of Plenipotentiaries which adopted the 1951 Convention:

> "The Conference
>
> Expresses the hope that the Convention relating to the Status of Refugees will have values as an example exceeding its contractual scope and that all nations will be guided by it in granting so far as possible to persons in their territory as refugees and who would not be covered by the terms of the Convention, the treatment for which it provides."

27. This recommendation enables States to solve such problems as may arise with regard to persons who are not regarded as fully satisfying the criteria of the definition of the term "refugee".

PART ONE

Criteria for the Determination of Refugee Status

CHAPTER I

GENERAL PRINCIPLES

28. A person is a refugee within the meaning of the 1951 Convention as soon as he fulfills the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.

29. Determination of refugee status is a process which takes place in two stages. Firstly, it is necessary to ascertain the relevant facts of the case. Secondly, the definitions in the 1951 Convention and the 1967 Protocol have to be applied to the facts thus ascertained.

30. The provisions of the 1951 Convention defining who is a refugee consist of three parts, which have been termed respectively "inclusion", "cessation" and "exclusion" clauses.

31. The inclusion clauses define the criteria that a person must satisfy in order to be a refugee. They form the positive basis upon which the determination of refugee status is made. The so-called cessation and exclusion clauses have a negative significance; the former indicate the conditions under which a refugee ceases to be a refugee and the latter enumerate the circumstances in which a person is excluded from the application of the 1951 Convention although meeting the positive criteria of the inclusion clauses.

DEFENDANTS' EXHIBIT NO. 1

DECLARATION OF BERNARD W. ARONSON

1. I, Bernard W. Aronson, am the Assistant Secretary of State for Inter-American Affairs. Under the general direction of the Secretary of State, I have primary responsibility for formulating and implementing U.S. foreign policy with respect to the countries in Latin America and the Caribbean. I have held this position since June 1989.

2. During this time period, I have devoted considerable time to formulating and carying out U.S. foreign policy toward Haiti, the poorest nation of those within the scope of my responsibilities. In that regard, I have played a principal role, in conjunction with officials from other U.S. agencies, in shaping U.S. policy responses to important events which have occurred in Haiti during the last year, including the historic and unprecedented free elections that were held in December 1990. In the post-election period, I have provided foreign policy direction to United States Government initiatives in support of the duly elected government of President Jean Bertrand Aristide, and in support of constitutional democracy [in] Haiti.

3. On September 30, 1991, the Aristide government was overthrown by a military coup. In the aftermath of the coup, a larger number than usual of Haitian national have chosen to leave their country, many seeking to sail to the United States in unseaworthy vessels. United States Coast Guard cutters have saved the lives of literally hundreds of Haitians by rescuing those found on the high seas in such vessels. These United States Government humanitarian efforts however have created an urgent, practical problem of what additional steps should now be taken with those who have been rescued, consistent with U.S. law and U.S. international legal obligations.

4. In an effort to devise an appropriate response to this situation, the Department of State launched a multinational diplomatic initiative, with the personal participation of President Bush and Secretary Baker, to identify third countries, particularly those in the region, who might be willing to provide temporary safehaven to Haitians rescued at sea. Despite the considerable energy invested in this initiative, only four countries to date have agreed to take a limited number of such Haitians. At this time, the Governments of Honduras, Venezuela, Belize and Trinidad and Tobago have in total offered to provide safehaven for up to 550 Haitians. Our diplomatic efforts in this regard are continuing. Until we can enlist the support of other safehaven countries or the number of Haitians perilously at sea is drastically reduced, keeping open all reasonable options for addressing this issue, including the possibility of repatriation to Haiti, will remain [an] important foreign policy objective.

5. In the multilateral diplomatic arena, the Department of State has played a central role in helping to establish the civilian OAS mission to restore constitutional democracy in Haiti. In the past several weeks, I personally have visited Haiti along with my OAS counterparts three times in attempts to restore peace, stability, and constitutional democracy to Haiti.

6. In addition, I regularly receive reliable reports from official sources as to overall conditions within Haiti. At this time, I have no basis for believing that repatriated Haitians have been or would be persecuted, arrested, punished or otherwise harassed upon return. Based on the Department's longterm analysis of conditions in Haiti, it is clear that the majority of Haitians who seek to leave that country do so because of the underlying economic conditions.

7. I have supported the longstanding U.S. policy goal not to bring to the United States Haitians who have been

rescued at sea on U.S. Coast Guard cutters and who have no colorable claim to refugee status. In my view, an open door policy would only serve as an incentive for even larger numbers of Haitians to risk their lives attempting to reach U.S. shores by boat, when we have strong reason to believe that at best only fifty percent of those who sail from Haiti survive the journey. Accordingly, humanitarian concerns dictate taking every reasonable step, including repatriation to Haiti, to discourage such attempts. It is my firm belief that halting the interdiction of Haitians in unseaworthy vessels would not only result in additional, and potentially avoidable, Haitian deaths at sea, but would also further extend the humanitarian crisis throughout the region.

8. The migrant interdiction agreement between the United States and Haiti, signed on September 23, 1981 (TIAS 10241) has proven to be highly beneficial to the Alien Migrant Interdiction Operation program with respect to illegal Haitian migrants. The continued implementation of that agreement should not be interrupted or thwarted as a consequence of this lawsuit. In this regard, neither President Aristide nor the de facto regime in Haiti has repudiated that agreement.

I declare under penalty of perjury that the foregoing is true and correct.

Executed in Washington, D.C.

November 20, 1991

/s/ Bernard W. Aronson
BERNARD W. ARONSON

DEFENDANTS' EXHIBIT NO. 26

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 91-2653-Civ-Atkins

HAITIAN REFUGEE CENTER, INC., ET AL., PLAINTIFFS

v.

JAMES BAKER, III, ET AL., DEFENDANTS

ORDER GRANTING MOTIONS TO MAINTAIN THE AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AS THE CLASS ACTION ON BEHALF OF PLAINTIFFS AND FOR LEAVE TO FILE SUPPLEMENTAL PLEADING AND SECOND AMENDED COMPLAINT

The court has considered the above motions and memoranda in support. The court notes that an answer has not yet been filed. For the reasons set forth in such motions and memoranda, the motions are granted. Accordingly, the court hereby determines that the amended Complaint can be maintained as a class action.

DONE AND ORDERED at Miami, Florida, this 3rd day of December, 1991.

/s/ C. Clyde Atkins
Senior United States District Judge

DEFENDANTS' EXHIBIT NO. 67

(Pleadings in *Haitian Refugee Center* v. *Baker*)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 91-2653-Civ-Atkins

THE HAITIAN REFUGEE CENTER, INC. a Florida not-for-profit Corporation, and ROLAND PROVIDENCE, MOISE CHARLES, ERIC PIERRE, RAYMOND EDME, GOLBERT MIRACLE, ROLAND JEAN, ROOSEVELT ALEXIS, LUC LUXEMBOURG SANON, LEGER PIERRE FRANTZ, OCHEL ENGERRIL, JEAN MICHEL MARIO AVILUS, ARCHILLE BELVU, LUCIEN ROZIER, EMMANUEL SAINTIL, CONDANSER JOSEPH on behalf of themselves and all others similarly situated, PLAINTIFFS,

-against-

JAMES BAKER, III, Secretary of State, REAR ADMIRAL ROBERT KRAMEK and ADMIRAL KIME, Commandants, United States Coast Guard, GENE MCNARY, Commissioner, Immigration and Naturalization Service, The United States Department of Justice, Immigration and Naturalization Service, and the United States, DEFENDANTS.

MOTION FOR LEAVE TO FILE SUPPLEMENTAL PLEADING AND SECOND AMENDED COMPLAINT

Plaintiffs move for leave to file the attached Supplemental Pleading and Second Amended Complaint for Declaratory and Injunctive Relief—Class Action ("Amended Complaint"), and in support of their Motion allege as follows:

1. The Amended Complaint sets forth occurrences and events which have happened since the date of the original petition filed herein and since the date of the Amended Petition and Complaint filed herein. Since the filing of the Amended Petition and Complaint, additional individual plaintiffs have asserted claims against defendants.

2. Fifteen new parties—all of whom are currently in detention on Coast Guard cutters or at Guantanamo Naval base are added as representatives of the class of plaintiffs. They have all been subjected to the INS failure to follow the terms of the Executive Order and the guidelines promulgated pursuant to it which has deprived the plaintiffs who are potential asylees of the protections set forth in the Refugee Act of 1980 and the Immigration and Nationality Act, that are extended to intercepted Haitians by the INS rule that all such Haitians who have a potential asylum claim are to be transported to the United States. The INS's failure to follow the terms of the Executive Order and its own guidelines has resulted in the denial of all the plaintiffs' First Amended rights of access and all the plaintiffs' procedural rights under the APA. The Amended Complaint sets forth no new claims for relief, but simply adds additional parties asserting the same claims for relief asserted in the Amended Petition and Complaint.

3. As defendants' answer has not as yet been filed in this action, and as discovery is still continuing by both parties, the granting of this Motion will not cause undue delay. As defendants have been advised of plaintiffs' intention to amend, defendants will not suffer prejudice in the making of their defense.

4. On Saturday, November 23, 1991, plaintiffs' counsel orally advised defendants' counsel that the complaint would be amended to add individual Haitian plaintiffs following the interviews thereof by plaintiffs' counsel that the Court had authorized.

WHEREFORE, in the interests of justice and for the reasons set forth in this Motion and the accompanying Memorandum of Law in support thereof, plaintiffs respectfully seek leave to file the attached Amended Complaint.

Dated: December , 1991

Respectfully Submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 91-2653-Civ-Atkins

THE HAITIAN REFUGEE CENTER, INC. a Florida not-for-profit Corporation, and ROLAND PROVIDENCE, MOISE CHARLES, ERIC PIERRE, RAYMOND EDME, GOLBERT MIRACLE, ROLAND JEAN, ROOSEVELT ALEXIS, LUC LUXEMBOURG SANON, LEGER PIERRE FRANTZ, OCHEL ENGERRIL, JEAN MICHEL MARIO AVILUS, ARCHILLE BELVU, LUCIEN ROZIER, EMMANUEL SAINTIL, CONDANSER JOSEPH on behalf of themselves and all others similarly situated, PLAINTIFFS,

-against-

JAMES BAKER, III, Secretary of State, REAR ADMIRAL ROBERT KRAMEK and ADMIRAL KIME, Commandants, United States Coast Guard, GENE MCNARY, Commissioner, Immigration and Naturalization Service, The United States Department of Justice, Immigration and Naturalization Service, and the United States, DEFENDANTS

SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF CLASS ACTION

Plaintiffs the Haitian Refugee Center, Inc. ("HRC"), and Roland Providence, Moise Charles, Eric Pierre, Raymond Edme, Golbert Miracle, Roland Jean, Roosevelt Alexis, Luc Luxembourg Sanon, Leger Pierre Frantz, Ochel Engerril, Jean Michel Mario Avilus, Archille Belvu, Lucien Rozier, Emmanuel Saintil, Condanser Joseph, on behalf of themselves and all others similarly situated, by their undersigned attorneys, as and for their complaint, allege as follows:

1. This is a complaint for declaratory and injunctive relief arising from the interdiction by the United States Coast Guard of Haitian vessels and their passengers on the high seas, from denial of access to said passengers held aboard Coast Guard cutters or at the Guantanamo Naval Base by the Haitian Refugee Center, Inc. ("HRC"), its attorneys, employees, and members, and from the failure of defendants to follow INS rules and relevant statutes protecting the potential POLITICAL asylees among those passengers from forcible return to Haiti.

2. Under an "interdiction program," the Coast Guard and the Immigration and Naturalization Service ("INS") intercept vessels on the high seas believed to be carrying Haitian aliens, many of whom meet the standard for political asylum and who seek refuge in our country. The Executive Order authorizing interdiction, Executive Order 12324, titled "Interdiction of Illegal Aliens," FR Doc. 81-28829, 46 Fed. Reg. 48109 ("Executive Order"), does not permit the forcible return of refugees. Pursuant to this order, the INS has promulgated guidelines designed to ensure the identification and protection of refugees.

3. In the aftermath of a September, 1991, military coup in Haiti, the Coast Guard has intercepted numerous vessels containing approximately 5000 Haitians as of December 1, 1991, many of whom are fleeing for their lives. This lawsuit seeks access by the HRC, its attorneys, employees, and members, to the Haitian plaintiffs detained at the Guantanamo Naval Base and on Coast Guard Cutters in order to advise these plaintiffs many of whom are members of HRC, of their rights in the asylum process and of HRC's interest in providing representation and assistance to them in furtherance of its organizational goals. In addition, HRC seeks to assure that such plaintiffs have a full and fair opportunity to present the merits of their asylum claims and that such claims are determined by defendants in accordance with the Executive Order, the INS Guidelines, the immigration statute, the

Administrative Procedure Act, the U.N. Convention and Protocol for the Status of Refugees, and other legal requirements. Plaintiffs invoke the Court's equitable powers to ensure that our laws are complied with and that those plaintiffs having legitimate asylum claims are not returned to Haiti.

Jurisdiction and Venue

4. Plaintiffs' claims arise under the Immigration and Nationality Act, 8 U.S.C. Sections 1101(a)(43), 1158, 1253(h), the Refugee Act of 1980, 8 U.S.C. Section 1521 note, and regulations promulgated thereunder, the Administrative Procedure Act 5 U.S.C. §§ 551 *et seq.*, the First Amendment to the United States Constitution, the United Nations Protocol Relating to the Status of Refugees, the Universal Declaration of Human Rights, and principles of international law and jurisdiction is based on 28 U.S.C. § 1331, as a civil action arising under the Constitution, laws, or treaties of the United States, and 8 U.S.C. § 1329, as a civil cause arising under the Immigration and Nationality Act, as amended.

5. Venue is proper in this district under 28 U.S.C. Section 1391(e), as some defendants in the action reside here, a substantial part of the events or omissions giving rise to the claim occurred here and some plaintiffs reside in this district. No real property is involved in this action.

6. Plaintiffs, by their attorneys, bring this action for injunctive and declaratory relief pursuant to Rules 65 and 57 of the Federal Rules of Civil Procedure.

Parties

7. Plaintiff, HRC is a non-profit membership corporation located in Miami, Florida. The HRC's purpose, as set forth in its bylaws is to promote the well-being of Haitian refugees through appropriate programs and activities, including legal representation of Haitian refugees, education regarding legal and civil rights, orientation, acculturation, and social and referral services. It has brought substantial lawsuits challenging procedures and practices of the INS in processing Haitian refugee applications and has been recognized by the INS as a source of legal counsel for indigent Haitians.

8. The HRC's membership includes United States citizens, resident aliens and non-resident aliens, including the Haitian plaintiffs and the class they represent. From its inception, the HRC's membership has included Haitian refugees seeking political asylum in the United States.

9. Plaintiff, Roland Providence, is a Haitain refugee who was picked up at sea by United States Coast Guard cutter. Since 1987, he was a group leader for Ti Legliz. Providence led group discussions in churches and disseminated information supporting Aristide in his local church. He was a member of the FNCD, and a delegate monitoring polling places during the 1990 election. After the coup, Providence went into hiding where he learned from his brothers that the military shot up his house looking for him. He fled the country. Providence was interviewed for only four or five minutes by a Haitian woman (not through a translator) who was unsympathetic, did not ask what Ti Legliz was (although Providence told her he was a member), and who pressured and rushed him through the interview. The interviewer did not give Providince a chance to tell what happened to him in any detail. He was "screened-out," *i.e.*, he was determined not to meet the standards for asylum and is sought to be returned by defendants to Haiti. If returned, plaintiff believes he would face persecution, and probably detention or death. The interview afforded the plaintiff was inadequate to allow plaintiff to meaningfully assert his claim for asylum.

10. Plaintiff, Moise Charles, is a Haitian refugee who was picked up at sea by Coast Guard Cutter. Moise

Charles, president of the Ansa Rouge Coordination Association was also a polling place observer for Aristide's party in the 1990 presidential election. Despite his political activities, he was neither asked about, nor able to assert, his political affiliations during his five minute INS interview. Prior to departing Haiti, two military personnel and one civilian came to his home to arrest him. He was "screened-out," *i.e.*, he was determined not to meet the standards for asylum and is sought to be returned by defendants to Haiti. If returned, plaintiff believes he would face persecution, and probably detention or death. The interview afforded the plaintiff was inadequate to allow plaintiff to meaningfully assert his claim for asylum.

11. Plaintiff, Eric Pierra, is a Haitian refugee who was picked up at sea by Coast Guard Cutter. Eric Pierra was a member of the FNCD (National Front for Change to Democracy), the political coalition supporting Aristide. Prior to his departure from Haiti, he was warned by some relatives that the army was about to arrest him. The army had previously been to his home and sprayed it with bullets, killing his father. Plaintiff Pierra was barely questioned during his INS "interview" and was not specifically asked about his participation in the FNCD. He was "screened-out," *i.e.*, he was determined not to meet the standards for asylum and is sought to be returned by defendants to Haiti. If returned, plaintiff believes he would face persecution, and probably detention or death. The interview afforded the plaintiff was inadequate to allow plaintiff to meaningfully assert his claim for asylum.

12. Plaintiff, Raymond Edme, is a Haitian refugee who was picked up at sea by a United States Coast Guard Cutter and is presently on board the U.S.S. Courageous. He advised the INS interviewer, during his twelve minute interview (including time for translation), which plaintiff describes as "rushed," that he was a member

of the AJN (a neighborhood youth organization) and that his brother, who had been taken, "screened-in," and taken to Miami, was president of the AJN. The interviewer never inquired what the AJN was, or what the plaintiff's brother's name was. Prior to his departure from Haiti, and immediately after the coup occurred, he was advised that the military had come to arrest him. Plaintiff and his brother immediately left Haiti. Plaintiff was "screened-out," *i.e.*, he was determined not to meet the standards for asylum and is sought to be returned by defendants to Haiti. If returned, plaintiff believes he would face persecution, and probably detention or death. The interview afforded the plaintiff was inadequate to allow plaintiff to meaningfully assert his claim for asylum.

13. Plaintiff, Golbert Miracle, is a Haitian refugee picked up at sea by the United States Coast Guard. Miracle, his mother, and his aunt all resided together and all worked as "mandats" (local representative) of the FNCD (National Front for Change to Democracy). On November 8, 1991 about twelve soldiers came to their home. Miracle's mother was in the courtyard in front of the home and was immediately shot to death by the soldiers. Miracle's aunt and sisters were arrested and their whereabouts are unknown. Miracle left Haiti on the next day. He was interviewed on board the cutter by two persons for approximately three minutes. Before the interview began, the interpreter advised Miracle that everyone was claiming political problems and that, no matter what he said, he would be returned to Haiti. Nonetheless, Miracle attempted to tell all that he could in the three minutes the INS granted him. Miracle has a father who is a permanent resident in Miami.

14. Plaintiff, Roland Jean, is a Haitian refugee picked up at sea by the United States Coast Guard. Jean was a member of the "Komite Ti-Legliz" (Committee of Small Churches) which is a large organization of commu-

nity based Catholic Churches working with and educating the poor. The Ti Legliz constitute an important segment of national support for Aristide. Jean also serves as a "mandat" for the FNCD. On November 5, 1991, police forcibly entered Jean's home and arrested his father, a known Aristide supporter. Jean managed to escape arrest and fled Haiti. Jean was "screened-out" after a five minute interview. During the interview, the INS interpreter belittled his claim to asylum and informed him that he was going to be returned to Haiti, inexplicably because he had engaged in conduct which was disrespectful of the Haitian military authorities. He was "screened-out," *i.e.*, he was determined not to meet the standards for asylum and is sought to be returned by defendants to Haiti. If returned, plaintiff believes he would face persecution, and probably detention or death. The interview afforded the plaintiff was inadequate to allow plaintiff to meaningfully assert his claim for asylum.

15. Plaintiff, Roosevelt Alexis, is a Haitian refugee who was picked up at sea by the United States Coast Guard. During a political meeting on November 5, 1991 the military stormed the meeting hall and killed several members of his group. The military hunted him down and chased him to his home. He escaped, but the military killed his mother and father. During his INS interview, he was tired and weak. While explaining his reasons for leaving Haiti, the interviewer acted in a rude manner, telling Alexis that he could "jump up and down," but would still be sent back to Haiti. The interview lasted five minutes. He was "screened-out," *i.e.*, he was determined not to meet the standards for asylum and is sought to be returned by defendants to Haiti. If returned, plaintiff believes he would face persecution, and probably detention or death. The interview afforded the plaintiff was inadequate to allow plaintiff to meaningfully assert his claim for asylum.

16. Plaintiff, Luc Luxembourg Sanon, is a Haitian refugee who was picked up at sea by the United States Coast Guard. He was an ardent supporter of Aristide and attempted to organize a demonstration in support of Aristide's return. The military was after Sanon for his efforts supporting Aristide. He was interviewed for about fifteen minutes during which the interview was constantly interrupted. He was "screened-out," *i.e.*, he was determined not to meet the standards for asylum and is sought to be returned by defendants to Haiti. If returned, plaintiff believes he would face persecution, and probably detention or death. The interview afforded the plaintiff was inadequate to allow plaintiff to meaningfully assert his claim for asylum.

17. Plaintiff, Leager Pierre Frantz, is a Haitian refugee who was picked up at sea by the United States Coast Guard. Military officers arrested him at his home because of his support for Aristide. He managed to escape and fled the country. He was interviewed for four or five minutes. He was afraid to talk because he did not trust the interviewers. He did not know whether the interviewers would turn the information over to the illegal government in Haiti. He was sick and exhausted during the interview. Two days after being interviewed he collapsed from fatigue and required medical attention. He was "screened-out," *i.e.*, he was determined not to meet the standards for asylum and is sought to be returned by defendants to Haiti. If returned, plaintiff believes he would face persecution, and probably detention or death. The interview afforded the plaintiff was inadequate to allow plaintiff to meaningfully assert his claim for asylum.

18. Plaintiff, Ochel Engerril, is a Haitian refugee picked up at sea by the U.S. Coast Guard. He was a strong supporter of the FNCD and Aristide. His brother was shot to death after the coup by army soldiers. His home was destroyed by the army. He fled his home and Haiti fearing for his life. He was interviewed by two women aboard a cutter for about fifteen minutes. They

never informed him who they were or why they were interviewing him. He was physically exhausted during the interview. He did not tell and was not asked about his brother's being killed or his home being destroyed. He was not ask questions about these subjects. He was "screened-out," *i.e.*, he was determined not to meet the standards for asylum and is sought to be returned by defendants to Haiti. If returned, plaintiff believes he would face persecution, and probably detention or death. The interview afforded the plaintiff was inadequate to allow plaintiff to meaningfully assert his claim for asylum.

19. Plaintiff, Jean Michel Mario Avilus, is a Haitian refugee picked up at sea by the United States Coast Guard. Avilus formed a group after the coup that discussed politics and the overthrow of Aristide. The group met at his home. He was advised by friends that his name was on a list of persons targeted by the illegal government in Haiti. He and his group left Haiti. Avilus was rushed through his INS interview and was not given a fair opportunity to plead his case for asylum. Avilus told the interviewer about the list and the military wanted to kill him. He attempted to tell the interviewer even more but the interviewer cut him off and stopped the interview. He was "screened-out," *i.e.*, he was determined not to meet the standards for asylum and is sought to be returned by defendants to Haiti. If returned, plaintiff believes he would face persecution, and probably detention or death. The interview afforded the plaintiff was inadequate to allow plaintiff to meaningfully assert his claim for asylum.

20. Plaintiff, Archille Belvu, is a Haitian refugee picked up at sea by the United States Coast Guard. Belvu was the Secretary General of a peasant labor union and a member and representative of the FNCD. Belvu escaped arrest and fled Haiti. He was interviewed for 5-7 minutes and was not told the purpose of the interview. He did not know who was interviewing him. When he said that he left because of the political crisis, the

interpreter became very angry with him. She said that everyone was saying that they left because of politics. The interviewer argued and cursed him. Belvu did not tell the interviewer that he was a member of the FNCD because of the interviewer's reaction. He was "screened-out," *i.e.*, he was determined not to meet the standards for asylum and is sought to be returned by defendants to Haiti. If returned, plaintiff believes he would face persecution, and probably detention or death. The interview afforded the plaintiff was inadequate to allow plaintiff to meaningfully assert his claim for asylum.

21. Plaintiff, Lucien Rozier, is a Haitian refugee who was picked up at sea by the United States Coast Guard. He was a member and representative of the FNCD, campaigned extensively for Aristide, and was well known for his political activities. After the coup, soldiers searched for Rozier. He fled Haiti and his boat was interdicted by the Coast Guard. Rozier spent nine days on board the cutter during which time he was unable to sleep because of horrendous conditions. He wa[s] interviewed for almost twenty minutes. He was scared by the interviewer, not told who was interviewing him, or the reason for the interview. He was "screened-out," *i.e.*, he was determined not to meet the standards for asylum and is sought to be returned by defendants to Haiti. If returned, plaintiff believes he would face persecution, and probably detention or death. The interview afforded the plaintiff was inadequate to allow plaintiff to meaningfully assert his claim for asylum.

22. Plaintiff, Emmanuel Saintil, is a Haitian refugee picked up at sea by the United States Coast Guard. He was a founding member of a human rights organization which sought to insure human rights to Haiti's poor. He actively participated in meetings with Aristide, and was an FNCD delegate during the elections. The military was searching for him and killed his father. He was interviewed for approximately four minutes and was not

permitted to go into any detail with the interviewer. He fears being killed upon his return to Haiti. He was "screened-out," *i.e.*, he was determined not to meet the standards for asylum and is sought to be returned by defendants to Haiti. If returned, plaintiff believes he would face persecution, and probably detention or death. The interview afforded the plaintiff was inadequate to allow plaintiff to meaningfully assert his claim for asylum.

23. Plaintiff, Condanser Joseph, is a Haitian refugee who was picked up at sea by the United States Coast Guard. He was a founding member of an organization that advocated political change in Haiti and an Aristide supporter. The military came to his home after the coup, killed his younger brother and search[ed] for Joseph. He was asked several questions during a three minute interview. Despite assertions that the military was after him and that he feared being killed if returned to Haiti, the interviewer did not ask any follow-up questions. Joseph told the interviewer that he had family members victimized and killed. Still there were no follow-up questions. Joseph had no idea why he was being questioned or who was questioning him. He did not have the opportunity to explain why he left Haiti. Joseph felt that any explanation would have been useless because he knew he would be returned regardless of the answers he gave. He was "screened-out," *i.e.*, he was determined not to meet the standards for asylum and is sought to be returned by defendants to Haiti. If returned, plaintiff believes he would face persecution, and probably detention or death. The interview afforded the plaintiff was inadequate to allow plaintiff to meaningfully assert his claim for asylum.

24. The individual plaintiffs who are presently aboard vessels intercepted by the Coast Guard or detained at the Naval base in Guantanamo Bay also represent other similarly situated persons who seek, and are entitled to seek, refugee status in the United States. They wish to avoid forcible return to Haiti, where they face the risk

of unlawful arrest, detention, persecution and possible death. The HRC also considers the above named plaintiffs and similarly situated persons to be members of HRC by virtue of their presence on territory within the control of the United States such as the Naval Base at Guantanamo Bay and Coast Guard Vessels. Upon information and belief, the Haitians detained at Guantanamo are on non-military portions of the base. The intercepted Haitians are entitled to seek effective assistance from the HRC, and likewise, the HRC would assist the interdicted Haitians regarding their desires to seek refugee status if permitted to do so by defendants.

25. The individual plaintiffs on behalf of themselves and all others similarly situated on the intercepted vessels and at land based centers to which they have been taken are, by the current operation and implementation of the interdiction program, unable to secure protection against refoulement without a spokesperson. HRC seeks to represent these members' interests in this lawsuit. HRC has been denied, and continues to be denied in its own right, the ability to provide effective representation to its interdicted members.

26. Defendants Kramek and Kime are Commandants of the United States Coast Guard. Other Coast Guard officers who are implementing the interdiction program are acting under their direction and command. These defendants are being sued in their official capacity.

27. Defendant Gene McNary is the Commissioner of the INS. The INS officers on board the Coast Guard cutters are acting under his direction and supervision. Defendant McNary is being sued in his official capacity.

28. Defendant James Baker, III is the Secretary of State and in that capacity has the final decision making authority within his department. Upon information and belief, it is the State Department that has directed the other United States agencies to forcibly return Haitian refugees. Defendant Baker is sued in his official capacity.

29. Defendant Department of Justice is the agency of the United States with oversight and ultimate responsibility for the enforcement of the immigration laws of the United States.

30. Defendant Immigration and Naturalization Service is the agency charged with the direct responsibility for enforcing the immigration laws of the United States.

31. Defendant The United States is a sovereign and has ultimate responsibility for all of its agencies and officers.

The Interdiction Program

32. On September 29, 1981 the President issued Proclamation 4865, FR Doc. 81-28828, 46 Fed. Reg. 48107 ("the Proclamation"), which announced a program of "interdiction: on the high seas of vessels transporting aliens." The Proclamation purports to authorize the United States Coast Guard to stop and board United States, unregistered, and certain foreign vessels, to make inquiries to determine if their passengers are undocumented migrants bound for the United States, and, if so, to return them to the country from which they came. The Executive Order by its terms limits the government's authority by permitting repatriation *only* of persons who are not refugees.

33. Section 2(c)(3) of the Executive Order instructs the Coast Guard to "return [a] vessel and its passengers to the country from which it came . . . *provided, however, that no person who is a political refugee will be returned without his consent.*" (Emphasis added). The Executive Order thus incorporates the principle of *"non-refoulement"*—a prohibition against forced repatriation of refugees that is embodied in both international and domestic law.

34. The United States is a party to the United Nations Protocol Relating to the Status of Refugees (the "Protocol"), which incorporates the United Nations Convention Relating to the Status of Refugees ("Convention"). Article 3 of the Convention provides that

> No contracting state shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group, or political opinion.

Section 243(h)(1) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1253(h)(1), also states that

> The attorney general shall not deport or return any alien . . . to a country if the attorney general determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

35. Both the Convention and the INA define "refugee: as a person who is "outside the country of his nationality" and is "unable or . . . unwilling . . . to return to that country" because of a "well-founded fear of persecution["] on account of "race, nationality, membership in a particular social group, or political opinion." *See* Convention, Art. I; INA § 101(42), 8 U.S.C. § 1101.

36. The Executive Order acknowledges "international obligations" as a basis for expressly incorporating these standards. It states in Section 3 that

> the Attorney General shall . . . that whatever steps are necessary to insure the fair enforcement of our laws relating to Immigration . . . and the strict observance of our international obligations concerning those who genuinely flee persecution in their homeland.

The United States reaffirmed these obligations in a "cooperative agreement" with Haiti regarding the interdiction program. The agreement provides that:

it is understood . . . the United States Government does not intend to return to Haiti any Haitian migrants whom the United States authorities determine to qualify for refugee status.

Agreement Effected By Exchange of Notes, signed at Port-au-Prince September 23, 1991, entered into force September 23, 1991.

The INS Guidelines

37. At the inception of the interdiction program, the INS issued "guidelines" intended to establish procedures for identifying and protecting refugees, including:

(a) that INS officers shall be present aboard Coast Guard vessels carrying out the interdiction program;

(b) that such INS personnel "shall be constantly watchful for any indication (*including bare claims*) that a person or persons on board the interdicted vessel may qualify as refugees under The United Nations Convention and Protocol" (emphasis added);

(c) that interviews shall be conducted in conditions, including privacy, designed to ensure full presentation of claims;

(d) that transcription of interviews and other records shall be maintained to facilitate eventual presentation of claims to authorities in the United States/ and

(e) that potential asylees shall be removed from the vessel and provided with passage to the United States. *INS Role In and Guidelines For Interdiction at Sea*, October 6, 1981.

38. The INS did not observe these initial rules. Rather, during the decade following their promulgation, interviews were often as short as five minutes; they were not conducted in private and they were otherwise insufficient as the Haitian emigres on the interdicted vessels often had been deprived of food and water so that they were physically and mentally incapable of then taking

part in an effective interview. As a result of these defective procedures, only 28 of the over 24,000 Haitians on vessels interdicted by the Coast Guard from the inception of the interdiction program in 1981 until mid-1991 were identified by INS officials as potential asylees.

39. In response to complaints about defective procedures, the Justice Department acknowledged, in June 1991, that pre-screening procedures aboard interdicted vessels were faulty. Improvements were to include:

(a) better training of INS personnel and formal certification of Creole interpreters;

(b) more careful briefing of Haitians as to the purpose of pre-screening procedures;

(c) lengthier and more careful interviews;

(d) more thorough documentation of claims and more careful review of such documentation; and

(e) parole for all persons transported to the United States to pursue asylum claims and adjudication of such claims before a member of the Asylum Officer Corps.

The Immediate Events Giving Rise to This Action

40. President Aristide was elected in December 1990 in the first fully democratic elections to take place in Haiti in over 200 years. Before he even took his oath of office he was challenged by an unsuccessful coup. The September 1991 coup was not only successful—it has resulted in a widely publicized reign of terror in Haiti. On information and belief, in the past two months several thousand Haitians, many of them supporters of the Aristide government, have been killed or subjected to violence and destruction of their property, producing fear and desperation throughout the country.

41. In the wake of this chaos and mass violence, thousands of Haitians have sought to escape by sea. They have resorted to boats that are overloaded, unseaworthy, lacking basic safety equipment, and operated by inexperienced persons.

42. According to the government's own figures, more Haitians have left Haiti in the past month than in any prior month.

43. On information and belief, pursuant to the Executive Order, United States Coast Guard cutters have been on patrol in the international waters of the Windward Passage near Haiti since prior October 9, 1981 in response to the coup. On or about October 29, 1991, Coast Guard vessels began to interdict vessels carrying emigres fleeing from Haiti. To date, approximately 19 such vessels have been intercepted and more than 5000 emigres on these vessels are detained.

44. INS officials have reported that only twelve asylum officers, and nine interpreters, have been assigned to interview the interdicted Haitians. According to INS officials, interviews of some of the Haitians consisted of as little as 5 or 10 minutes of questioning concerning the Haitians identity and whether there was any reason they could not go back to Haiti, and much of that time was interpretation. The interviews were not conducted in privacy or consistent with other conditions provided by guidelines, and were otherwise insufficient given the conditions under which the interviews took place. Many Haitians have language and illiteracy deficits, and are socially and culturally conditioned to be unduly responsive to suggestive influences, particularly from authority figures such as the defendant officials who conducted the interviews. Several of the Haitians, including babies, children, and pregnant women, were ill and had high fevers at the time they were interviewed. Many were seasick, having spent several days at sea in rough waters. The Haitians were exposed to extreme temperatures on the deck of the Coast Guard vessels, where they were not sheltered or only partially sheltered, from sun, rain, wind and cold. Many of the Haitians were exhausted, and were in too much physical and mental distress to understand the import of the interviews or become aware of their rights.

45. The Haitians were interviewed without benefit of counsel and without being advised of their rights or of the nature and reason for the interviews. The interviewers were largely inadequately trained and supervised. Many were unaware or insufficiently aware of the prevailing conditions in Haiti. Moreover, the actual decision to screen-in or screen-out Haitians for further processing of a possible asylum claim in the United States was made by officials in Washington, D.C. or Miami, Florida who had no adequate means in most cases of assessing whether the interviewee had a "credible" fear of persecution. Those reviewing the statements taken by the interviewers in Washington, Miami or Guantanamo were also insufficiently trained and informed about conditions in Haiti at the time. On information and belief, some of the interviewers and reviewers were value biased or overly influenced by official government views concerning conditions in Haiti and thus were not neutral and detached decision makers. Additionally, the interviewers failed to reveal their biases and reliance upon facts outside the hearings to the interviewees, and failed to provide them with an opportunity to rebut or refute the biases and reliance on outside factors, or to make them part of the administrative record.

46. The interviews of the Haitian plaintiffs were conducted in a chaotic and uneven way. On information and belief, defendants have recently restructured the interview process and will conduct future interviews on land-based facilities rather than on the area. Defendants have maintained inadequate record-keeping concerning interviews, with the result that it is difficult or impossible to identify which individuals were interviewed and by whom, and impossible to ascertain this information on request.

47. The interviewees were compelled to appear in person before the interviewers without having any opportunity to be represented, accompanied, or advised by anyone knowledgeable.

48. One result of using defective procedures is the low rate of screen-ins for further processing. On information and belief only about 3% of the intercepted Haitian aliens were found to have stated a sufficient case to lead to further asylum processing in the United States.

49. Guantanamo Naval base and the Coast Guard cutters are the functional equivalents of United States territory. The lease of the Guantanamo Base provides that "during the period of the occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said area. . . ."

50. On November 18, 1991, defendants announced that it had commenced the forcible return of these people to Haiti, notwithstanding the evident inadequacy of INS efforts to identify potential asylees with any degree of procedural regularity and inevitably with a diminished degree of accuracy. Without this court's equitable relief, the government intends to return all those "screened out" to Haiti.

COUNT I

First Amendment Violations

51. Plaintiff repeats and realleges paragraphs 1 through 50 as though fully set forth herein.

52. The denial of access to the emigrees on Coast Guard cutters and at Guantanamo Naval base violates the rights of the individual plaintiffs and the class they represent and of HRC, whose organizational purpose has been thwarted in that it has been unable effectively to provide assistance to the refugees including legal assistance and information concerning their legal rights. These unlawful actions violate plaintiffs' freedom of speech and the right of association and to access to the public forum of the court, all protected by the First Amendment to the United States Constitution, and § 555(b) of the Administrative Procedure Act.

COUNT II

Procedural Violations

53. Plaintiff repeats and realleges paragraphs 1 through 52 as though fully set forth herein.

54. In the Executive Order, the United States explicitly concedes its international obligations with respect to refugees govern its conduct of the interdiction program, regardless of the location of these refugees outside the territory of the United States. Pursuant to the Executive Order, the INS has promulgated guidelines setting forth specific procedural requirements designed to ensure, in conformance with these international obligations, the identification and protection of refugees intercepted on the high seas.

55. The United States is a party to the United Nations Protocol Relating to the Status of Refugees ("the Protocol") which substantially incorporates the United Nations Convention relating to the Status of Refugees ("the Convention"). Article 33 of the Convention prohibits "*refoulement*", or the forced return, of persons to a country where their "life or freedom would be threatened on account of membership in a particular social group or political opinion." Article 3 of the Convention provides that its provisions are to be applied "to refugees without discrimination as to race, religion or country of origin."

56. The United States has also acceded to the United Nations Charter, which provides in Articles 55 and 56 for the promotion of fundamental human rights. In accordance with this article the General Assembly of the United Nations unanimously adopted on December 10, 1948, the Universal Declaration of Human Rights ("the Declaration"). Article 13 of the Declaration states that "[e]veryone has the right to leave any country, including his own . . . ." Article 14 states that "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution."

57. In addition, the Executive Order requires the INS to "ensure the fair enforcement of our laws relating to immigration," and the guidelines promulgated pursuant to this requirement provide potential asylees with transportation to the United States for the explicit purpose of asserting their rights under the immigration laws.

58. The United States immigration laws which are being enforced in the interdiction program include the Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102 ("Refugee Act"), which states that "it is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands." 8 U.S.C. § 1521. Pursuant to the Refugee Act, uniform procedures have been established by regulation under which applicants for refugee status are given opportunities to state their claims fully in writing, to adduce evidence supporting their claims, to have their claims reviewed and supported by the State Department's Bureau of Human Rights and Humanitarian Affairs and not to be returned to territories where they face persecution.

59. Further under the Immigration and Nationality Act, 8 U.S.C. § 1253(h), an alien may not be returned to a country where he will face threats to life or freedom on account of race, religion, nationality, membership in a particular social group, or political opinion. Pursuant to the Immigration and Nationality Act, procedures have been established that enable aliens asserting a claim for asylum to a hearing before an Immigration Judge, an appeal from his decision and the assistance of counsel in those proceedings.

60. Defendants' actions in conducting interviews of the Haitian plaintiffs and in "screening-out" many of them violate the procedural requirements of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 555 (b), 556, 557, 558 and 702. The Haitian plaintiffs, who are "persons" within the meaning of the APA, 5 U.S.C. § 551. Because of the failure of defendants to follow the

procedural requirements of the APA, they have made flawed determinations of the merits of the Haitian plaintiffs' substantial claims for asylum.

61. Defendants' failure to comply with INS guidelines and the procedural requirements of the Administrative Procedure Act has harmed, and, unless enjoined, will continue to harm plaintiffs and the members of the class they represent who are fleeing persecution and seeking asylum in the United States and who have been intercepted by the Coast Guard pursuant to the Interdiction Program. By failing to comply with INS guidelines, defendants have deprived the intercepted plaintiffs and the members of the class they represent of their procedural rights under the Executive Order, the Refugee Act, th Administrative Procedure Act, the INA and international law. The intercepted plaintiffs and the class they represent have no adequate remedy at law.

CLASS ACTION ALLEGATIONS

62. Haitian plaintiffs bring this action pursuant to Rule 23(a) and (b)(1)(2) on behalf of themselves and all other persons similarly situated. The class consists of the following presently ascertainable members:

(a) All Haitian refugees who are currently detained or who in the future will be detained on United States Coast Guard cutters and at Guantanamo Naval Base or elsewhere who were or will be interdicted on the high seas pursuant to the United States Interdiction Program and who are asserting violations of their First Amendment and procedural rights.

63. Defendants have acted or threatened to act on grounds generally applicable to each member of the class, thus making final declaratory and injunctive relief with respect to the class, as a whole, appropriate.

64. The plaintiffs are adequate representatives of their class because they have been subjected to or threatened with policies and procedures that are identical with the

policies and procedures that the members of their class have been subjected to or are threatened with, and because like members of their class, they seek declaratory and injunctive relief protecting their rights under the First Amendment, the Administrative Procedure Act, the immigration statute and regulations, the Protocol and other provisions of law.

65. A community of interest exists between plaintiffs and members of their class in that there are questions of law and fact which are common to all. They seek a determination of whether or not the practices and procedures of defendants are consistent with the APA, with the immigration statute, with INS Regulations, with the Protocol, with the Constitution, and with other provisions of law.

66. Individual suits by each member of the class would be impracticable because:

(a) There exist common and identical issues of law and fact for all members of the class; whether the policies and procedures of defendants with respect to exclusion violate INS Guidelines, Regulations and Statutes, the APA, the Protocol, the Constitution, and other provisions of law.

(b) The number of suits would impose an undue burden upon the courts.

(c) Many members of the class are unaware of their rights and/or are intimidated, due to their status as aliens.

67. A class action is superior to other available methods for the fair and efficient adjudication of this controversy.

68. No administrative remedies under the Immigration and Naturalization Act exist which remain to be exhausted that would not be futile or that would provide the relief sought herein. Those members of the class already "screened-out" have been subjected to final agency action.

69. No independent litigation has, as of the time of filing this suit, been brought by any member of the class against defendants as to the issues raised in this complaint.

70. Plaintiffs' counsel are experienced in class action litigation and can adequately represent the interests of class members as well as the named plaintiffs.

RELIEF SOUGHT

WHEREFORE, plaintiffs respectfully request the Court to grant the following relief against defendants and their successors in office:

(a) Certification of the class;

(b) Declaratory relief that the defendants' practices in forcibly returning Haitian refugees to Haiti under these circumstances would violate the terms of Executive Order 12324, the guidelines promulgated pursuant to the Executive Order, the interdiction treaty between the United States and Haiti, the Refugee Act of 1980, the Immigration and Nationality Act Sections 101(a)(43), 208 and 243(h), the APA, the United Nations Protocol Relating to Status of Refugees, the First and Fifth Amendments to the United States Constitution and other provisions of law;

(c) Setting aside the denial of asylum claims or the agency action "screening-out" members of the plaintiffs' class as being arbitrary and capricious, not in accordance with law, and not in accordance with procedural requirements;

(d) Preliminary and permanent injunctive relief ordering defendants to refrain from sending back to Haiti these Haitians who have not been identified as candidates for asylum until such time as procedures are implemented and followed which adequately protect and recognize the rights of these persons under the Executive Order, the INS guidelines promulgated pursuant thereto, the APA,

international law, as well as the privileges ordinarily afforded potential refugees under the Refugee Act of 1980 and the Immigration and Nationality Act, and preliminary and permanent injunctive relief granting HRC reasonable access to the persons interdicted by the defendants whether on Coast Guard cutters or at Guantanamo Naval Base or elsewhere; and

(e) Such other and further relief as the Court may deem just and proper, including reasonable attorneys' fees and costs.

Respectfully Submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

(Title Omitted in Printing)

MOTION TO MAINTAIN THE AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AS THE CLASS ACTION ON BEHALF OF PLAINTIFFS

Pursuant to Rule 23 of the Federal Rules of Civil Procedure and Rule 19 of the Local Rules of the United States District Court for the Southern District of Florida, the plaintiffs by and through their undersigned counsel, request that this Court determine that the Amended Complaint for Declaratory and Injunctive Relief insofar as it pertains to plaintiffs may be maintained as a class action. Plaintiffs seek a class that:

> Consists of all Haitian aliens who are currently detained or who in the future will be detained on U.S. Coast Guard cutters or at Guantanamo Naval base who were interdicted on the high seas pursuant to the United States Interdiction Program and who are being denied First Amendment and procedural rights.

In support of this Motion, plaintiffs have alleged sufficient class action allegations in their Complaint, have submitted a Memorandum of Law which although pertaining to petitioners is applicable in many respects to plaintiffs and will submit a Supplemental Memorandum of Law pertaining to the plaintiffs' class.

Dated: December , 1991

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

(Title Omitted in Printing)

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO FILE SUPPLEMENTAL PLEADING AND SECOND AMENDED COMPLAINT

Plaintiffs submit this Memorandum of Law in support of their Motion ("Motion") for leave to file their Supplemental Pleading and Second Amended Complaint ("Amended Complaint").

SUPPLEMENTAL PLEADING

Fed. R. Civ. P. 15(d) authorizes the court to permit the filing of a supplemental pleading "setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented." The original complaint was filed on November 19, 1991 to challenge the defendants' change in policy (occurring on November 18, 1991) concerning the return of Haitian asylees. Following communications with defendants, the complaint was amended to add first amendment claims then apparent. Following discovery as ordered by the District Court to occur beginning on November 21, 1991, individual plaintiffs have come forward to assert additional claims against the defendants.

Thus, 15 new parties are added and allegations concerning them are made with respect to occurrences or events which have happened since the filing of the Amended Complaint.

"The purpose of a supplemental pleading"—plainly served in this case—"is to bring a controversy up to date; to introduce newly-occurring facts enlarging or changing the relief sought in the original complaint."

Moore's Manual Federal Practice and Procedure § 9.09 [10] at 9-44. The fact that additional individual plaintiffs are added is not improper, as "the Supreme Court has sustained the use of Rule 15(d) to add additional parties where the events that transpired since the commencement of the action warranted such additions." *Moore's Manual Federal Practice and Procedure* § 9.09 [10], at 9-44 to 9-45; *e.g., Griffin v. School Board of Prince Edward County*, 377 U.S. 218 (1964).

AMENDMENT

Leave to amend a complaint under Rule 15, Fed. R. Civ. P., falls within the sound discretion of the trial court. *Zenith Radio Corp. v. Hazeltine Research*, 401 U.S. 321 (1971); *Foman v. Davis*, 371 U.S. 178 (1962). Rule 15(a) directs that "leave shall be freely given when justice so requires" and amendments as a general matter are favored in order to "facilitate a proper decision on the merits." *Conley v. Gibson*, 355 U.S. 41 (1957); *Borden v. Florida East Coast Railway*, 772 F.2d 750 (11th Cir. 1985) (There is a strong policy embodied in the Federal Rules of Civil Procedure favoring the liberality of amendment); *Andujar v. Rogowski*, 113 F.R.D. 151 (S.D.N.Y. 1986) (migrant worker's motion to amend complaint to add plaintiffs properly granted).

HRC may add additional plaintiffs under Rule 21, Fed. R. Civ. P. The Court possesses broad discretion under Rule 21 to permit adding additional parties at any stage in the litigation. 7, Wright & Miller, *Federal Practice and Procedure*, § 1688 (2d ed. 1986) The liberal standards upon which amendments are to be granted to pleadings when leave of court is required also govern the trial court in resolving motions to add parties. *Rollins Burdick Hunter of Wisconsin v. Lamberger*, 105 F.R.D. 631 (E.D. Wisc. 1985).

Under either authority, absent undue delay, bad faith, prejudice to the opposing party, or futility of the amendment, leave to amend should be freely granted. *Forman v. Davis*, 371 U.S. 178 (1962).

HRC seeks to add individual plaintiffs Roland Providence, Moise Charles, Eric Pierre, Raymond Edme, Golbert Miracle, Roland Jean, Roosevelt Alexis, Luc Luxembourg Sanon, Læger Pierre Frantz, Ochel Engerril, Jean Michel Mario Avilus, Archille Belvu, Lucien Rozier, Emmanuel Saintil and Condanser Joseph. All of the plaintiffs' claims arose out of the same occurrences; interdiction at sea by the U.S. Coast Guard. Additionally, the defendants will not suffer any prejudice by the addition of plaintiffs. The defendants have not yet filed a responsive pleading and have been fully aware, from the onset of the action, of the existence of the potential additional plaintiffs and of HRC's intent to add them at an appropriate time when authority to do so could be established.

Moreover, an amendment adding parties, substituting new parties or changing the capacity of the plaintiff is as permissible, *Moore's Manual Federal Practice and Procedure* § 9.09 [3], at 9-32, as is the addition of new subclasses or the redefinition of classes in a class action, or even the conversion of an individual action to a class action. *E.g., Zarata v. State Department of Health and Rehabilitative Services*, 347 F. Supp. 1004 (S.D. Fla. 1971).

Since the Amended Complaint will facilitate the presentation of the merits of the action, and will do so in an efficient manner which will not prejudice defendants or cause undue delay, the amendment should be freely permitted.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

(Title Omitted in Printing)

MEMORANDUM IN SUPPORT OF MOTION FOR CLASS ACTION CERTIFICATION

The Plaintiffs, by and through their undersigned counsel, submit this Memorandum in Support of their Motion to Maintain the Amended Complaint for Declaratory and Injunctive Relief as a Class Action on Behalf of Plaintiffs, filed on December —, 1991. As amended, the Amended Complaint adds 15 new parties—plaintiffs, Roland Providence, Moise Charles, Eric Pierre, Raymond Edme, Golbert Miracle, Roland Jean, Roosevelt Alexis, Luc Luxembourg Sanon, Leger Pierre Frantz, Ochel Engerril, Jean Michel Mario Avilus, Archille Belvu, Lucien Rozier, Emmanuel Saintil and Condanser Joseph, presently detained on Coast Guard cutters or at Guantanamo—who are all presently members of the class and in every respect fairly and adequately represent the interests of the class.

I. DEFINITION OF THE CLASS

The individual plaintiffs are all Haitian emigres who were intercepted by the United States Coast Guard pursuant to a "program of interdiction" that permits interception and repatriation of undocumented aliens. They are presently being held on Coast Guard cutters and at the U.S. Naval base in Guantanamo. They have all been "screened out" and thus are injured by the failure of the INS to observe rules and procedures designed to ensure that no person who is a political refugee will be returned without his consent. Effectively, as a result, each of these plaintiffs would be forcibly returned to

Haiti facing possible imprisonment and death were it not for the Court's order. They are all seeking a fair determination of their claim to political asylum and seek the assistance of the Haitian Refugee Center in processing those claims.

All 15 plaintiffs were subjected to the failure of the defendants to comply with INS guidelines for screening asylum claims. They were all denied procedural rights under the Executive Order of the INS guidelines. They were all denied rights under the Immigration and Nationality Act not to be returned to the country which threatens their life or freedom on account of their race, religion, nationality, membership in a particular social group, or political opinion. They were also all denied the rights under United Nations Protocol Relating to the Status of Refugees prohibiting forced return of refugees. All 15 plaintiffs were also subject to the defendants' practices of denying the HRC access in violation of their First Amendment rights of association.

The named plaintiffs seek to represent the class and persons similarly situated, to wit, Haitian refugees who: (1) are or will be detained aboard United States Coast Guard cutters currently in the high seas; (2) who are or will be held in detention at the U.S. Naval base at Guantanamo Bay; and (3) who are or will be denied their First Amendment and procedural rights to implementation of the INA's procedures for screening potential asylees.

As defined, this class action will involve approximately five thousand (5000) or more persons. The exact number of persons, as well as their names, alien registration numbers, and addresses or exact location, can be ascertained from the records of defendants.

Thus, the proposed class is sufficiently identifiable and defined for class action treatment.

II. THE PREREQUISITES OF RULE 23(a) TO MAINTAIN A CLASS ACTION ARE SATISFIED HERE

The prerequisites of a class action are: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

A. *The Class Is So Numerous That Joinder Of All Members Is Impracticable*

The proposed class consists of approximately five thousand or more persons, each of whom has been or will shortly be treated in a virtually identical manner by defendants with respect to their denial of First Amendment rights and of their procedural rights under INS guidelines and other sources of law. These policies and procedures have been adopted and implemented by defendants against plaintiffs as a class.

Evidence has already shown that members of the proposed class are poor, illiterate, unfamiliar with legal procedures, fearful of making claims against the authorities of the government, and unfamiliar with the English language. In light of the large number of indigent persons similarly situated, a class action is the only practicable procedural method for presentation of the claims asserted in the present litigation. The number of persons would render joinder an ineffective substitute for a class action. Additionally, failure to certify this class would result in untold hardship to the individual refugees who are indigent, illiterate, unfamiliar with and intimidated by legal procedures and litigation, and in detention with facing possible repatriation leading to potential loss of life and freedom. As a result, they are unable to assert their rights, absent class certification, and would face

imminent return and possible imprisonment and death in Haiti.

On these facts, class certification is thus particularly appropriate. The courts have long recognized the function of the class action mechanism as providing a forum and relief for claims which otherwise would not be enforced. *Nely v. United States*, 546 F.2d 1059, 1071 (3d Cir. 1976). The courts have stressed the lack of knowledge and sophistication of class members, and the need for their protection, as a basis for finding the class action mechanism appropriate. *E.g., City of New York v. International Pipe and Ceramic Corp.*, 410 F.2d 295 (2d Cir. 1969); *Gordon v. Forsythe Co. Hospital Authority, Inc.*, 409 F. Supp. 708, 717 (N.D.N.C. 1976). Class action is thus particularly appropriate where, as here, class members are ignorant of their rights or incompetent to assert them. *E.g., United States, ex rel. Morgan v. Sielaff*, 546 F.2d 218, 222 (7th Cir. 1976). ("Ignorance or illness.") *Addarly v. Wainwright*, 46 F.R.D. 97, 99 (N.D. Fla. 1968) (functionally illiterate prisoners). Moreover, class certification has been recognized as particularly appropriate where, as here, class members lack access to counsel, *United States ex. rel. Morgan v. Sielaff*, 546 F.2d 218, 111 [*sic*] (7th Cir. 1976) (poverty or lack of counsel); *Haynes v. Logan Furniture Mart, Inc.*, 503 F.2d 1161 (7th Cir. 1974) (poverty), or are reluctant to bring individual actions against those with legal authority over them. *Haynes v. Logan Funriture Mart, Inc.*, 503 F.2d 1161 (7th Cir. 1974) (poverty); *STE Marie v. Eastern R.R. Ass'n*, 72 F.R.D. 443, 449 (S.D.N.Y. 1976) (employees of defendant).

B. *There Are Questions Of Law Or Fact Commons Of The Class*

Each member of the proposed class of plaintiffs claims a deprivation of his/her rights based upon virtually identical actions by the Immigration and Naturalization

Service. Plaintiffs are challenging INS policies concerning the screening of potential asylees. Plaintiffs are challenging general policies and practices which have been applied, and which, they allege, will be applied, to all Haitian refugees—policies and practices which have violated the plaintiffs' procedural rights and First Amendment rights under the various regulations, statutes, treaty, Constitutional provisions and international law. This lawsuit is not intended to establish whether any particular refugees have a legitimate claim for asylum or are properly excludable. Rather, it is intended to insure that the government follows appropriate procedures which will provide each individual refugee an effective opportunity to establish his or her claim.

There are thus present both common questions of fact and of law. The cases make clear that either will suffice, and that all questions need not be common questions. *Likke v. Carter*, 448 F.2d 789 (5th Cir. 1971). Where, as here, defendants' "pattern practice or policy" applies across the board, there are common questions of fact provable by evidence common to the class. *Rich v. Martin Marietta Corp.*, 552 F.2d 333 (10th Cir. 1975); *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239 (3d Cir.) *cert. denied*, 421 U.S. 1011 (1975).

Moreover, there are common questions of law relating to each member of the class For example, the defendants' failure to follow INS guidelines setting forth procedures designed to identify potential asylees equally effects each class member. The forced return of the refugees violates the INS guidelines, the Executive Order and various statutory and Constitutional provisions. These legal issues are common to all plaintiffs, these held on the Coast Guard cutters as well as those held in Guantanamo Bay.

The individual variations in the facts presented, and the outcomes of properly conducted hearings, are simply irrelevant to this lawsuit, the purpose of which is primarily to insure lawful procedural rights. *E.g., Himmler v. Weinberger*, 422 F. Supp. 196 (E.D. Mich. 1976)

(class action appropriate to seek hearings regarding denial of medicare reimbursement, though questions of eligibility for benefits would be individual); *Cicargo v. Olgiati*, 410 F. Supp. 1080 (S.D.N.Y. 1976) (class action appropriate to challeneg parole board procedures "although the Parole Board's decisions in individual cases of course involve facts peculiar to each prisoner").

Indeed, the commonality issue is clearly satisfied because the INS guidelines issued with intention to establish procedures for identity and protecting all refugees applies to all persons interdicted by the Coast Guard pursuant to the interdiction programs.

C. *Typicality of Claims*

The typicality requirement focuses on the individual claim of the class representatives, and requires that it have the essential characteristics common to the claims of the class. *Moore's Federal Practice*, ¶ 23.06-2, at 23-191. The named plaintiffs are adequate representatives of their class because they have been subjected to unlawful policies and procedures that are identical with the unlawful policies and procedures that members of their class have been or will be subjected to, and because, like members of their class, they seek consultation with and access to counsel, an opportunity to apply for political asylum, and enforcement of the INS guidelines. A community of interests exists between plaintiffs and members of their class in that there are questions of law and fact common to all. The 15 added plaintiffs present claims that are in every respect typical of the claims of the class. To the degree that there might be individual differences in fact as to the minute details in the manner in which any of the added plaintiffs or members of their class were treated by defendants, these differences do not negate the fact that the added plaintiffs and the individual members of the class they represent were all subjected to the *same* policies and practices by defendants.

D. *The Plaintiffs Will Fairly And Adequately Represent The Interests Of The Class*

The 15 individual plaintiffs clearly meet the adequacy of representations standard. In any event, the named plaintiffs clearly will fairly and adequately represent the interests of the class. Their claims and interests are in all respects identical to those of the members of the proposed class. None of their claims are moot. Thus, it is apparent that the representative plaintiffs will diligently and fairly protect and pursue the interests of their class. Counsel for the named individuals plaintiffs have been involved in numerous class actions and have repeatedly demonstrated their skill and diligence in presenting class action litigation, including their work thus far in the present action. The ability of plaintiffs to carry this litigation forward to its conclusion, although the individual plaintiffs are indigent, is assured by the support provided by the Haitian Refugee Center, Inc.

III. THIS IS A PROPER CLASS ACTION UNDER RULE 23(b)(2)

Rule 23(b)(2) provides for a class action where the four prerequisites discussed above are met and the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate injunctive relief or corresponding declaratory relief with respect to the class as a whole.

The present case results from the acts of defendants toward Haitian refugees who were detained pursuant to the interdiction program. Defendants have acted on grounds generally applicable to all named individual plaintiffs and the members of the class they seek to represent by adopting and applying policies and practices concerning the interdiction of refugees which denied the plaintiffs their First Amendment rights and procedural rights.

The final relief sought is in the nature of injunctive and declaratory relief, settling the legality of defendants' behavior with respect to the class as a whole. See, Notes of Advisory Committee on Rules, 39 F.R.D. 69, 102 (1966). No monetary relief is requested in the present lawsuit. Thus, final declaratory and injunctive relief with respect to the class as a whole is appropriate.

IV. THIS COURT HAS JURISDICTION OVER THE CLASS WHICH PLAINTIFFS REPRESENT

Each member of the proposed class meets the jurisdictional requirements alleged in the Amended Complaint.

V. CONCLUSION

Plaintiffs submit that this action fulfills all the requirements for certification as a class action under Fed. R. Civ. P. 23(a) and 23(b)(2), and that it is proper for this Court to permit the Amended Complaint to be maintained as a class action for the reasons set forth herein. This Court should therefore certify the class so that the action may proceed on behalf of all Haitiain aliens currently detained on U.S. Coast Guard cutters or at Guantanamo Naval Based who are being denied their procedural and First Amendment rights.

Dated: December , 1991

Respectfully Submitted,

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DEFENDANTS' EXHIBIT NO. 119

(Declaration of John W. Cummings, and Exhibits A-L thereto).

DECLARATION OF JOHN W. CUMMINGS

I, John W. Cummings, declare as follows:

1. I have been employed by the Immigration and Naturalization Service (INS) since April of 1978. I am currently the Acting Assistant Commissioner for Refugees, Asylum and Parole. I am responsible for implementing the laws, rules, and regulations pertaining to the Refugee Program, the Asylum Program, and the Parole Program.

2. In 1981, pursuant to Presidential Proclamation Number 4865, September 29, 1981, and Executive Order Number 12324, September 29, 1981, the United States government began high seas interdiction of illegal aliens. See Exhibits A and B, Presidential Proclamation and Executive Order. The program was implemented in 1981 and guidelines and procedures were promulgated. See Exhibit C, Meissner memo. This program was known as the Alien Migrant Interdiction Operation (AMIO) but is now referred to as the asylum pre-screening program.

3. On September 24, 1982, INS issued guidelines for interdiction at sea that superseded the guidelines that were issued when the program was first implemented. See Attachment D, Carmichael memo. The guidelines issued at that time stated that "each person aboard an interdicted vessel shall be spoken to by an INS officer, through an interpreter." A log record was to be maintained for each person spoken to and the following inquiries were to be made:

a. Name;
b. Date of Birth;
c. Nationality;

d. Home Town (obtain sufficient information to enable a later location of the individual to check on possible persecution);

e. All Documents or Evidence Presented;

f. Why did you leave Haiti;

g. Why do you wish to go to the United States;

h. Is there any reason why you cannot return to Haiti?

4. The memorandum also stated that INS officers were to be alert for any indications that a person might qualify as a refugee under the United Nations Convention and Protocol. If there were any indications that a person might be a refugee the INS officer was to conduct an interview out of the hearing of other persons regarding the alien's possible qualification for refugee status. Individual records were to be made of all such interviews and persons who appeared to have a bona fide claim to refugee status were removed from the interdicted vessel and transported to the United States. See Attachment D.

5. The guidelines and instructions have been periodically updated and expanded. See Attachments E and F, Immigration & Naturalization Team Boarding Instructions, September 1, 1983; Immigration Naturalization Team Boarding Instructions, September 24, 1985. However, the basic concept of pre-screening has remained the same since the beginning of the program.

6. The purpose of the asylum pre-screening process is to determine, in an informal, nonadversarial setting, whether a person exhibits a credible fear of persecution and should therefore be brought into the United States in order to apply for asylum. The pre-screening process is necessarily a brief one, designed to take place when interdicted aliens are taken into custody on Coast Guard cutters on the high seas.

7. During the eleven years that the program has been in place aliens from nineteen different countries have been

interdicted. Although the majority of interdictions involve nationals of Haiti and the Dominican Republic, INS has also encountered nationals of Bangladesh, Colombia, India, Jamaica, Bahamas, and Sri Lanka.

8. The current INS operational guidelines were communicated to INS officers in memoranda dated March 1, November 22 and November 30, 1991. Copies of these memoranda are attached as Exhibits G through I.

9. Currently, all interviews are conducted by INS asylum officers who have undergone extensive training since the reorganization of the asylum program mandated by the asylum regulations issued on July 27, 1990, 8 C.F.R. Part 208. This training included extensive review of substantive asylum law as well as carefully developed sessions on interview techniques. Instruction was given not only by officials of INS and other government agencies, but also by representatives of non-government organizations active in asylum issues.

Since that time additional training and guidance has been provided to officers regarding the standards for determining whether a person has shown a credible fear of returning to his or her country of origin, in this case Haiti. As set forth in the November 22 Memorandum (Exhibit H), these standards include but are not limited to the following examples of acts which may establish a person's eligibility for asylum:

1. Serious threats to life or freedom;
2. Deliberate imposition of serious economic hardship, so as to deprive a person of all means of earning a livelihood;
3. Constant surveillance;
4. Purposeful interference with a person's privacy, family, home, or correspondence;

5. Enforced social or civil inactivity; and

6. Pressure to become an informer.

Officers are encouraged to ask questions in order to obtain adequate information for initially evaluating a person's claim for asylum.

10. The pre-screening process that has been in effect since 1981, is not intended as a full adjudication of an individual's eligibility for refugee status. The pre-screening is intended to do nothing more than identify persons who have established a credible fear of returning, in this case, to Haiti because of a serious danger or threat of harm on account of race, religion, nationality, membership in a particular social group, or political opinion. The proof necessary to establish a credible fear of returning is considerably less than that required to prove eligibility for refugee status. If a person establishes a credible fear of returning, he or she is then eligible for transfer to the United States to pursue an asylum claim. Many persons who meet the credible fear of returning standard may ultimately be found not to be refugees, but the credible fear test ensures that persons who are refugees are not mistakenly sent back to Haiti.

11. Several months ago, a temporary restraining order was entered against the government that prohibited the repatriation of Haitians who had been interdicted. See *HRC v. Baker*, No. 91-2653-CIV-Atkins (S.D. Fla.). During the pendency of that litigation, the Coast Guard vessels were unable to return any persons to Haiti. This resulted in serious overcrowding on board the Coast Guard vessels. In response to the court's order and in light of the serious overcrowding on the Coast Guard vessels, the United States opened temporary housing and processing facilities at the United States Naval Base at Guantanamo Bay, Cuba.

12. The majority of pre-screening interviews have been conducted at the Guantanamo facilities. Interviews on board the Coast Guard vessels were resumed sometime in mid-February of this year. However, there are instances in which persons will be brought to Guantanamo for the pre-screening process. For example, if the Coast Guard vessel has too many people on board, or weather conditions prohibit on board processing, the interdicted aliens will be brought to Guantanamo. Prior to the pre-screening interview the Haitian nationals are briefed on the interview process. The substance of the briefing is a modified version of Attachment A to Exhibit G. It is intended not only to prepare people for the interviews they are about to have, but also to reassure them about the confidentiality of the process and the importance of explaining their own situation fully and truthfully. This briefing is repeated by the asylum officer prior to each interview.

13. Pre-screening interviews typically last 20 to 30 minutes. To help reduce anxiety and encourage full disclosure of personal conditions, all members of an immediate family are usually interviewed in a group.

14. At the outset of each interview the asylum officers explain again the purpose of the interview. If the person states that he or she has a fear of return to Haiti, the officer explores in more detail the elements of the claim, attempting to discern whether there may be a correlation between the stated grounds for the fear and the statutory bases for asylum. Additionally, the officer makes a determination about the credibility of the claim. If the interviewee does not articulate a fear of return, the officer asks a series of questions designed to determine if such a fear does exist. Examples of the questions used by the officers are found in Attachment B to the March 1 memorandum (Exhibit G) and in the November 22 memorandum (Exhibit H). Once again, if the person then describes such a fear, the officer develops the details

of the claim. The officer then makes the same evaluations: (1) whether there exists a correlation between the grounds for the fear and the bases for asylum; and (2) the credibility of the claim.

15. In evaluating these claims, the asylum officers in Guantanamo have access to country information reports prepared by the State Department and other government organizations. Additionally, the asylum officers have information provided, at the request of the INS Resource Information Center, by a wide range of non-governmental organizations, with specific information on the current human rights situation in Haiti. Use of this information is specifically provided for in the asylum regulations, 8 C.F.R. § 208.12. This country-specific information has been read by all interviewers and discussed extensively at lengthy training sessions conducted on an ongoing basis. The country specific information would include, for example, known allegations of mistreatment of repatriated Haitians.

16. The officer records the information from each interview on a pre-screening interview record, a copy of which is Attachment C to the March 1 memorandum (Exhibit G). To help ensure consistency, accuracy, and fairness in both the interviews and the recommendations, each record is reviewed by a quality control team headed by a supervisory asylum officer. These reviewers can reverse individual recommendations where appropriate.

17. At this time INS has pre-screened all interdicted Haitians. However, it is important to remember that the interdiction program is ongoing. An interdiction could take place at any time and the aliens would have to be pre-screened. To the best of my knowledge, at this time the pre-screening process is complete and those persons who have 1) been "screened in," 2) had a medical screening that established that the alien does not have any communicable diseases, and 3) been inspected by an

INS Inspector are being brought into the United States to pursue their asylum applications.

18. Prior to entering the United States all persons must undergo a medical screening to determine whether the person has any communicable diseases of public health significance. Each "screened in" person is also inspected to ensure that persons who are statutorily precluded from admission to the United States are not paroled into the United States. An example of someone who is statutorily precluded from admission would be a person who was convicted of murder. In addition, the Community Relations Service (CRS) of the Department of Justice makes every effort to coordinate the placement of "screened in" persons with local voluntary organizations before the person is brought to the United States.

19. To date, 6,526 Haitians have been "screened in," determined to have a credible fear of returning to Haiti. Of that number, approximately 3,100 have been paroled into the United States after having undergone a medical screening that established they did not have any communicable diseases of public health significance. The majority of "screened in" aliens will be paroled into the United States. However, there are other steps that must be completed before an interdicted alien with a communicable disease of public health significance is brought into the United States.

20. There are still approximately 3,500 "screened in" Haitians at Guantanamo. This group consists of Haitians who:

a.) Have completed the medical screening process, do not have any communicable diseases, and will be paroled into the United States as soon as such things as CRS placement and transportation can be arranged; or

b.) Are awaiting the results of their medical screening and will be paroled into the United States when

the medical screening is completed and it is determined they do not have any communicable diseases; or

c.) Have been found to have a communicable disease (HIV) and are statutorily precluded from admission to the United States; or

d.) Have been found to be statutorily precluded from admission to the United States because they have been convicted of aggravated felonies or other particularly serious crimes.

21. The number of persons "screened in" before the September 1991 coup was so small that the issue of excludability on the basis of a communicable disease of public health significance, or criminal convictions, did not present itself. However, current statistics, based on those Haitians who were "screened in" and have completed the medical testing, show that the percentage of "screened in" Haitians who have a communicable disease of public health significance (HIV) is approximately five to seven percent of the "screened in" population. Therefore, we expect the total population of "screened in" Haitians with a communicable disease of public health significance to be between 200 and 400 persons.

22. Because aliens who have a communicable disease are statutorily precluded from entering the United States, the group of "screened in" Haitians who are HIV infected present a special problem. Section 212(a)(1) of the Immigration and Nationality Act (INA), Exhibit J, Rees Memo.

23. With respect to refugees, the INA provides that the Attorney General may waive the medical exclusion "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest." Section 207 (c)(3) of the INA. The INA further provides that the Attorney General may parole aliens into the United States "for emergent reasons or for reasons deemed strictly in

the public interest." Section 212(d)(5)(A) of the INA. In addition, a person who is a refugee may be paroled into the United States, rather than admitted as a refugee under the formal refugee admission process, only when the Attorney General finds parole to be required by "compelling reasons in the public interest." Section 212 (d)(5)(B) of the INA.

24. In an effort to ensure that no genuine refugee is repatriated, and that persons are not brought into the United States who are not genuine refugees when the statute and public safety preclude their admission into the United States, INS is conducting a second interview to determine whether persons who are HIV infected qualify as refugees under the INA. This requires a finding by the Asylum Officer that the person is unable or unwilling to return to Haiti because of a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

25. This is not an asylum or refugee adjudication. Rather, we are using the well-founded fear test to help the government in determining whether or not it should exercise its discretion to grant parole to persons statutorily ineligible for admission to the United States.

26. Second interviews are conducted according to the usual standards and techniques for asylum interviews. See Exhibit K, Interview Checklist, INS Asylum Branch Procedures Manual and Operations Instructions, p. 121 (March 1992). As previously stated, all INS Asylum Officers have undergone extensive training which included an exhaustive review of substantive asylum law as well as carefully developed sessions on interview techniques.

27. At the conclusion of each second interview the asylum officer prepares an Asylum Assessment for each applicant and makes a recommendation that the alien is, or is not, eligible for refugee status in accordance with the format set forth in the Procedures Manual and Operations Instructions. See Exhibit L, p. 122-25.

28. All Asylum Assessments are then forwarded to the Director of the Asylum Branch and the Asylum Assessments are reviewed by INS Headquarters. Final determinations are not made by the Asylum Officers at Guantanamo Bay. The Asylum Officer only makes a recommendation on whether the alien qualifies as a refugee under the INA.

29. When INS Headquarters makes a determination that a well-founded fear of persecution exists, the case is then forwarded to the State Department for information concerning the accuracy of the applicant's assertions about his or her experiences and about country conditions specific to the events in the claim.

30. As long as the State Department does not provide any adverse information, the person is then eligible to apply to the Attorney General for a discretionary grant of parole on the premise that he or she is in all probability a refugee.

31. This procedure is only followed when a person has a communicable disease of public health significance that is not curable. Persons who can be treated and cured receive medical treatment and are then paroled into the United States when the disease is cured. In some instances treatment is completed after parole.

32. INS has a total of 82 Asylum Officers. We are currently in the process of training 77 Asylum Officers who will graduate on March 27, 1992, and immediately enter on duty. A substantial number of the officers now on duty have been rotated through Guantanamo Bay. At the present time, 15 teams, consisting of an Asylum Officer and a Creole-speaking interpreter, are stationed at Guantanamo Bay. In addition, 2 supervisory officers are stationed at Guantanamo. INS has also stationed support staff and administrative personnel at the base. There are also three INS Inspectors at Guantanamo who process those aliens who are screened into the United States. The Inspectors determine whether the "screened

in" aliens may be brought to the United States and prepare employment authorization documents for aliens paroled into the United States.

33. The absence of the Asylum Officers from their regular duty stations has had a significant impact on the growing backlog of asylum cases at the asylum offices. It has also effected INS's ability to issue employment authorization to asylum applicants.

ACCESS TO COUNSEL

34. In addition to refugee processing, there are numerous immigration benefits that require application and processing outside of the United States. There is no right to counsel during the application and processing of these immigration benefits. Although this does not mean that an attorney may not play a role in the process, attorneys have no right to appear, put on witnesses, or challenge decisions that are made in overseas processing.

35. As previously stated, the purpose of the asylum pre-screening process is to determine, in an informal, nonadversarial setting, whether a person exhibits a credible fear of persecution and should therefore be brought into the United States in order to apply for asylum. The pre-screening process is necessarily a brief one, designed to take place when interdicted aliens are taken into custody on Coast Guard vessels on the high seas. Access to counsel is logistically incompatible with Coast Guard interdictions. It is also incompatible with the informal and nonadversarial interview pre-screening process.

36. INS's inability to repatriate screened out aliens to Haiti due to the injunction that was entered in *HRC v. Baker*, No. 91-2653-CIV-Atkins (S.D. Fla.) necessitated the temporary relocation of the interviewing process to Guantanamo. But for this fact, there would not be a large production population of Haitians at the Guantanamo Naval Base. It would have been inappropriate to make fundamental changes in the process on the basis

of this temporary circumstance that was caused by the court order. Moreover, it would be inconsistent to allow counsel access to aliens who for some reason cannot be interviewed on board the Coast Guard vessels but deny aliens who are interviewed on board a vessel access to counsel.

37. In addition, to maintain a meaningful interview process, access to the aliens being held at Guantanamo is—in coordination with military authorities (*see* 32 C.F.R. § 761—restricted to those persons or organizations who have been approved to enter in an official capacity in connection with the U. S. government's processing of interdicted aliens (such as the United Nations High Commission on Refugees), to provide essential services to the aliens or to provide information to the public on issues relating to the process, and whose presence, in the judgment of INS officials, will not unduly interfere with the confidentiality, efficiency, security, or effectiveness of the process.

38. If access to counsel had been permitted during the pre-screening it would have caused substantial problems. At one point there were approximately 12,000 interdicted Haitians at Guantanamo. The Base facilities were being taxed beyond their capacity. Simple daily necessities such as sanitation, housing, food, and communications were becoming a problem. Allowing counsel access to the aliens would have exacerbated the situation.

39. Moreover, any time a large number of people are concentrated in a small area there are crowd control and safety concerns that arise. Control of the population is a major concern. The safety of aliens, government personnel, and counsel would be more difficult to assure if the camp population were subject to outside influences. Just the logistics of moving aliens to areas where they could meet with counsel would pose a problem.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 20, 1992 at Phoenix, Arizona.

/s/ John W. Cummings
JOHN W. CUMMINGS
Acting Assistant Commissioner
for Refugees, Asylum and Parole
Immigration and Naturalization
Service

EXHIBITS "A" Presidential Proclamation No. 4865
and "B" Executive Order 12,324
are included separately in this Joint Appendix

EXHIBIT C TO
DECLARATION OF JOHN W. CUMMINGS

MEMORANDUM

Subject

INS Role in and Guidelines for Interdiction at Sea; Revised: March 29, 1982

Date 5 Apr. 1982 CO 208-C

To All INS Employees Assigned to Duties Related to Interdiction at Sea

From Doris M. Meissner
Acting Deputy Commissioner
Immigration & Naturalization Service

The following directives are to be followed by INS employees assigned to Coast Guard vessels interdicting vessels at sea pursuant to Presidential Proclamation Number 4865, dated September 29, 1981, and Executive Order Number 12324, dated September 29, 1981.

GENERAL:

- Due to the sensitive nature of the assignment, all INS employees will be under the direct supervision of INS Central Office Headquarters, Associate Commissioner, Examinations.

- The only function INS officers are responsible for is to ensure that the United States is in compliance with its obligations regarding actions toward refugees, including the necessity of being keenly attuned during any interdiction program to any evidence which may reflect an individual's well-founded fear of persecution by his or her country of origin for

reasons of race, religion, nationality, membership within a particular social group or political opinion.

• The duties of INS employees assigned to United States Coast Guard vessels will be limited to matters related to the interview of persons on board with respect to documentation relating to entry into the United States and possible evidence of refugee status.

• Except for independent determinations with respect to documentation relating to entry into the United States and possible claims to refugee status, INS officers will be subject to maritime directives and rules made by the Commanding Officer of the United States Coast Guard vessel.

AUTHORITY:

1. Presidential Proclamation Number 4865 dated September 29, 1981 (High Seas Interdiction of Illegal Aliens).
2. Executive Order Number 12324 dated September 29, 1981 (Interdiction of Illegal Aliens).
3. Associate Attorney General's directive to the Acting Commissioner of INS, dated October 2, 1981.
4. Article 33, United Nations Convention and Protocol Relating to the Status of Refugees.

BOARDING OF VESSELS:

• All decisions relating to which vessels will be interdicted and in what manner vessels will be boarded will be made at the discretion of the Commanding Officer of the United States Coast Guard vessel.

• INS officers and interpreters will be members of each boarding party. INS employees will not be armed.

• All initial announcements to the master, crew, and passengers of a boarded vessel as to the purpose of boarding, separation of crew and passengers, and general procedures (including advice that the boarded vessel may be returned to Haiti) will be made by United States Coast Guard personnel at the time the vessel is first boarded.

INS OFFICER RESPONSIBILITIES:

A. To the extent that it is, within the opinion of the Comanding Officer of the United States Coast Guard vessel, safe and practicable, each person aboard an interdicted vessel shall be spoken to by an INS officer, through an interpreter. A log record shall be maintained of each such person, based on their responses to the following inquiries:

   1. Name;
   2. Date of Birth;
   3. Nationality;
   4. Home Town (obtain sufficient information to enable a later location of the individual to check on possible persecution);
   5. All Documents or Evidence Presented;
   6. Why did you leave Haiti;
   7. Why do you wish to go to the United States;
   8. Is there any reason why you cannot return to Haiti.

B. A copy of the log prepared by the INS officers shall be provided to the Commanding Officer of the Coast Guard vessel.

C. INS shall be constantly watchful for any indication (including bare claims) that a person or persons on board the interdicted vessel may qualify as refugees under the United Nations Convention and Protocol.

D. If there is any indication of possible qualification for refugee status by a person or persons on board an interdicted vessel, INS officers shall conduct individual interviews regarding such possible qualification.

E. Interviews regarding possible refugee status shall be conducted out of the hearing of other persons.

F. If necessary, INS officers will consult with Department of State officials, either on board, or via radio communications.

G. Individual records shall be made of all interviews regarding possible qualification for refugee status.

H. If the interview suggests that a legitimate claim to refugee status exists, the person involved shall be removed from the interdicted vessel, and his or her passage to the United States shall be arranged.

I. Individual record folders shall be prepared and maintained by INS officers in every case where a person is being sent on to the United States, and such record folder may be used to support such person's claim in the United States. (The individual folder shall contain a sworn statement by the applicant concerning the claim.)

CHANGES:

• Any of the foregoing directives is subject to revision on the basis of experience.

CONDUCT AND SHIPBOARD PROCEDURES FOR I&NS PERSONNEL

QUARTERS: Assigned quarters will be kept neat and clean in conjunction with room-mates. Bunks will be made every morning, and linen changed once a week on the assigned day.

MEALS: Officers and civilians are only charged for the meals they eat. Each I&NS employee must pay all of his food bill before he leaves the ship. The same wardroom procedures followed by ship officers will be followed by I&NS personnel while using the wardroom. No one should be seated at the lunch or dinner meal until the XO is seated and given permission to the others. If the XO is still seated when you are ready to leave the table his permission should be requested before leaving. Leftover snacks are kept in the wardroom pantry for after hours. Coffee and cold drinks are always available. The average cost for 3 meals is $5 to $6 per day.

LAUNDRY: You may send you laundry once a week on the assigned day for officers by purchasing a laundry bag at the ship's store. Leave the bag outside of your room and the officer's mess cook will pick it up and return it the same day. Civilian clothes do not make out well in the ship's laundry and you may want to do your own.

SHIP'S STORE: The ship's store is open at noon and 5:00 P.M. for about an hour. Tobacco, candy, soap, and various sundry items are available at reasonable prices.

MAIL: Mail should be addressed with your name, the name of the ship and c/o U.S. Coast Guard Air Station, Clearwater, Florida. Outgoing mail will leave by helicopter to Guantanamo Bay, Cuba, sometime during the week and leave the C-130 on Friday to the States. Incoming mail will leave each Saturday on the incoming C-130 and will be picked up by the ship's helicopter on

the same day. Stamps are available in the ship's post office.

AUTHORIZED AREAS: Most areas aboard ship are open to I&NS personnel, except the rooms marked RESTRICTED. Likewise, I&NS personnel should not enter other living quarters unless invited by those living there. Machinery spaces should not be entered unless accompanied by a crewmember who will gladly show you around. During flight, quarters on the after half of the open decks are restricted for safety. While on the bridge I&NS personnel should not get in the way of operating personnel during boarding, docking or any other operation where the bridge personnel are busy. The wardroom should be vacated during officers call at 12:30 P.M. daily.

SHORE LEAVE: When in Guantanamo Bay, Cuba, or Haiti, I&NS personnel are restricted to the same shore leave as the officers and crew and must be back aboard one hour before the time set for departure. In Guantanamo Bay, the stores are available to I&NS personnel as well as other establishments catering to the military. There is a telephone center near the Marine Corps exchange, where you may phone the States. Public taxi is available dockside if you do not wish to walk.

EXHIBIT D TO
DECLARATION OF JOHN W. CUMMINGS

MEMORANDUM

Subject INS Role in and Guidelines for Interdiction at Sea; Revised: September 24, 1982

Date September 24, 1982 CO 208-C

To All INS Employees Assigned to Duties Related to Interdiction at Sea

From Andrew J. Carmichael, Jr.
Associate Commissioner
Examinations

The following directives are to be followed by INS employees assigned to Coast Guard vessels interdicting vessels at sea pursuant to Presidential Proclamation Number 4865, dated September 29, 1981, and Executive Order Number 12324, dated September 29, 1981.

GENERAL:

- Due to the sensitive nature of this assignment, all INS employees will be under the direct supervision of INS Central Office Headquarters, Associate Commissioner, Examinations.

- The only function INS officers are responsible for is to ensure that the United States is in compliance with its obligations regarding actions toward refugees, including the necessity of being keenly attuned during any interdiction program to any evidence which may reflect an individual's well-founded fear of persecution by his or her country of origin for reasons of race, religion, nationality, membership within a particular social group or political opinion.

- The duties of INS employees assigned to United States Coast Guard vessels will be limited to matters

related to the interview of persons on board with respect to documentation relating to entry into the United States and possible evidence of refugee status.

• Except for independent determination with respect to documentation relating to entry into the United States and possible claims to refugee status, INS officers will be subject to maritime directives and rules made by the Commanding Officer of the United States Coast Guard vessel.

AUTHORITY:

1. Presidential Proclamation Number 4865 dated September 29, 1981 (High Seas Interdiction of Illegal Aliens).
2. Executive Order Number 12324 dated September 29, 1981 (Interdiction of Illegal Aliens).
3. Associate Attorney General's directive to the Acting Commissioner of INS, dated October 2, 1981.
4. Article 33, United Nations Convention and Protocol Relating to the Status of Refugees.

BOARDING OF VESSELS:

• All decisions relating to which vessels *will* be interdicted and in what manner vessels will be boarded will be made at the discretion of the Commanding Officer of the United States Coast Guard vessel.

• INS officers and interpreters will be members of each boarding party. INS employees will not be armed.

• All initial announcements to the master, crew, and passengers of a boarded vessel as to the purpose of boarding, separation of crew and passengers, and general procedures (including advice that the boarded vessel may be returned to Haiti) will be made by

United States Coast Guard personnel at the time the vessel is first boarded.

INS OFFICER RESPONSIBILITIES:

A. To the extent that it is, within the opinion of the Commanding Officer of the United States Coast Guard vessel, safe and practicable, each person aboard an interdicted vessel shall be spoken to by an INS officer, through an interpreter. A log record shall be maintained of each such person, based on their responses to the following inquiries:

   1. Name;
   2. Date of Birth;
   3. Nationality;
   4. Home Town (obtain sufficient information to enable a later location of the individual to check on possible persecution);
   5. All Documents or Evidence Presented;
   6. Why did you leave Haiti;
   7. Why do you wish to go to the United States;
   8. Is there any reason why you cannot return to Haiti?

B. A copy of the log prepared by the INS officers shall be provided to the Commanding Officer of the Coast Guard vessel.

C. INS officers shall be constantly watchful for any indication (including bare claims) that a person or persons on board the interdicted vessel may qualify as refugees under the United Nations Convention and Protocol.

D. If there is any indication of possible qualification for refugee status by a person or persons

on board an interdicted vessel, INS officers shall conduct individual interviews regarding such possible qualification.

E. Interviews regarding possible refugee status shall be conducted out of the hearing of other persons.

F. If necessary, INS officers will consult with Department of State officials, either on board, or via radio communications.

G. Individual records shall be made of all interviews regarding possible qualification for refugee status.

H. If the interview suggests that a bona fide claim to refugee status may exist, the person involved shall be removed from the interdicted vessel, and his or her passage to the United States shall be arranged.

I. Individual record folders shall be prepared and maintained by INS officers in every case where a person is being sent on to the United States, and such record folder may be used to support such person's claim in the United States. (The individual folder shall contain a sworn statement by the applicant concerning the claim.)

CHANGES:

• Any of the foregoing directives is subject to revision on the basis of experience.

As per request from Renee L. Szybala, Department of Justice, Item H amended to read "may exist", August 25, 1982.

As per request from BHRHA, Item H "bona fide claim" should be substituted for "legitimate claim", September 24, 1982.

EXHIBIT E TO DECLARATION OF JOHN W. CUMMINGS

IMMIGRATION & NATURALIZATION TEAM BOARDING INSTRUCTIONS

1. The I&NS team will answer all boarding calls by reporting to the Bridge. When a Haitian Vessel has been identified and the Captain of the Coast Guard Cutter has decided to board the vessel, the team will report to the boarding Officer at the small boat station. A stena type pad will be carried to record the information necessary for the boarding report to be prepared on the cutter.

2. The Immigration Officer and interpreters will make the initial boarding of the Haitian vessel with the CG boarding Officer and assist him with translating and a document check of the vessel and POB's. If the vessel is engaged in legitimate trade and all POB's are properly documented as crew or passengers the I&NS team will aid the boarding Officer in obtaining the names and other data from the crew necessary for the boarding report.

On vessels where either all or some POB's are found to be undocumented Migrants, the I&NS Officer will question each Migrant as to his nationality, destination, purpose of trip, and any documents he might have. If the answers indicate they are undocumented Haitian Migrants enroute to the U.S. to work, they are to be informed that they cannot legally continue to the U.S. and must be returned to Haiti. Each Migrant should then be asked if he or she has any fear in returning to Haiti. If the answers are No, the Captain of the Cutter will then be informed that there are (number of Male, Female, & Children) to be returned to Haiti.

3. When a possible applicant for asylum is identified, INS Officer will consult with the Boarding Officer and decide where further interview will take place. If the

INS Officer finds that the alien has a possible claim to asylum, he will forward the "question sheet" by cable for advisory opinion from Department of State, BHRHA. Once the opinion has been given, the INS Officer will make the determination to either forward the applicant to the United States, or return him to Haiti.

4. If the Captain of the Coast Guard Cutter, due to weather or other reasons, decides to terminate the boarding, INS will take whatever steps necessary to assure that an individual with a valid claim to asylum is not returned to Haiti.

5. At All times the I&NS team will be under the direction of the CO and the Boarding Officer, with the exception of the process of making the required INS determinations.

6. Immediately after the decision to return has been made, the I&NS team will obtain the names place and date of birth and home address of each Haitian Migrant. The I&NS Officer will then assist the Operations Officer aboard the Cutter with the SITREP required at this time. After the initial report is completed the I&NS team will question each adult Migrant separately and obtain from them a brief resume of the events that took place before their departure and during the voyage to the point of interception. The questioning is for intelligence purposes. The I&NS Officer should attempt to uncover any organized smuggling operation and obtain the names of any smugglers in the group or on shore. The information should be freely given by the Migrant. The I&NS Officer will then prepare a brief report on his findings. A copy of this report along with copies of the resume from each migrant will be given to the Operation's Officer, a copy will remain in the INS boarding bag aboard the Cutter, another prepared for the U.S. Embassy attache at Port-Au-Prince and one copy to the I&NS Interdiction Officer in Miami.

7. During the rest of the voyage to PAP the I&NS team will mingle with the Haitian Migrants assisting the Coast Guard team tending the Migrants. The team will be alert for any indication of fear of returning to Haiti.

8. Upon arrival in Port-Au-Prince, the I&NS Officer will give both the Coast Guard Liaison Officer and the U.S. Embassy Official a copy of the report obtained in #6, and a copy of the names and addresses of the Migrants. The Haitian Government Immigration Officer will need 4 copies of the list of names and addresses. *NO* other information obtained from the Migrants will be given to any Haitian official.

9. During the Haitian processing the I&NS Officer and interpreter will remain in the room and observe the proceedings until the migrants are released to the Haitian Red Cross. The I&NS Officer should be alert for any act or demeanor on the part of the Haitian Officials which would indicate present on intended persecution or punishment of the Haitian Migrants.

WANGDOC 1751Z
REV 09 AUG 83

/s/ Harold L. Boyce
HAROLD L. BOYCE
Supervisory Interdiction
Operations Officer

EXHIBIT F TO DECLARATION OF JOHN W. CUMMINGS

IMMIGRATION & NATURALIZATION TEAM BOARDING INSTRUCTIONS

1. The I&NS team will answer all boarding calls by reporting to the Bridge. When a Haitian vessel has been identified and the Captain of the Coast Guard cutter has decided to board the vessel, the team will report to the boarding Officer a the small boat station. A stena type pad will be carried to record the information necessary for the boarding report to be prepared on the cutter.

2. The Immigration Officer and interpreters will make the initial boarding of the Haitian vessel with the CG boarding Officer and assist him with translating and a document check of the vessel and POB's. If the vessel is engaged in legitimate trade and all POB's are properly documented as crew or passengers the I&NS team will aid the boarding Officer in obtaining the names and other data from the crew necessary for the boarding report.

On vessels where either all or some POB's are found to be undocumented Migrants, the I&NS Officer will question each Migrant as to his nationality, destination, purpose of trip, and any documents he might have. If the answers indicate they are undocumented Haitian Migrants enroute to the U.S. to work, they are to be informed that they cannot legally continue to the U.S. and must be returned to Haiti. Each Migrant should then be asked if he or she has any fear in returning to Haiti. If the answers are NO, the Captain of the cutter will then be informed that there (number of Male, Female, & Children) to be returned to Haiti.

3. When a possible applicant for asylum is identified, I&NS Officer will consult with the Boarding Officer and decide where further interivew will take place. If the I&NS Officer finds that the alien has a possible claim to

asylum, he will forward the "question sheet" by cable for advisory opinion from Department of State, BHRHA. Once the opinion has been given, the I&NS Officer will make the determination to either forward the applicant to the United States, or return him to Haiti.

4. If the Captain of the Coast Guard cutter, due to weather or other reasons, decides to terminate the boarding, I&NS will take whatever steps necessary to assure that an individual with a valid claim to asylum is not returned to Haiti.

5. At All times the I&NS team will be under the direction of the CO and the Boarding Officer, with the exception of the process of making the required I&NS determinations.

6. Immediately after the decision to return has been made, the I&NS team will obtain the names place and date of birth and home address of each Haitian Migrant. The I&NS Officer will then assist the Operations Officer aboard the cutter with the SITREP required at this time. After the initial report is completed the I&NS team will question each adult migrant separately and obtain from them a brief resume of the events that took place before their departure and during the voyage to the point of interception. The questioning is for intelligence purposes. The I&NS Officer should attempt to uncover any organized smuggling operation and obtain the names of any smugglers in the group or on shore. The information should be freely given by the migrant. The I&NS Officer will then prepare a brief report on his findings. A copy of this report along with copies of the resume from each migrant will be given to the Operations Officer, a copy will remain in the I&NS boarding bag aboard the Cutter, another prepared for the U.S. Embassy attache at Port-Au-Prince and one copy to the I&NS Interdiction Officer in Miami.

7. During the rest of the voyage to Port-Au-Prince the I&NS team will mingle with the Haitian Migrants assist-

ing the Coast Guard team tending the migrants. The team will be alert for any indication of fear of returning to Haiti.

8. Upon arrival in Port-Au-Prince, the I&NS Officer will give both the U.S. Coast Guard Liaison Officer and the U.S. Embassy official a copy of the report obtained in #6, and a copy of the names and addresses of the migrants. At least 10 more copies of the list of names and addresses will be prepared for the Haitian officials and the Haitian Red Cross workers. Any other information obtained concerning the smuggling operation will be evaluated by the Embassy Officer, and only he may give part or all of our information to the Haitian officials, for use in any action against the smugglers.

9. During the Haitian processing the I&NS Officer and interpreter will remain in the processing area and observe the proceedings. After the last migrant has been released to the Haitian Red Cross, the I&NS team may leave the area. During the processing the team should be alert for any act or demeanor on the part of the Haitian officials which would indicate present or intended persecution or punishment of the Haitian migrants. The Haitian Major, in charge of the water front, has granted us use of the tourist facilities on the dock for processing large groups of migrants. After any group has left the cutter for processing in the tourist area, they are still under the protection of the bilateral agreement, until the last one has been cleared by the Haitian authorities and has been turned over to the Haitian Red Cross. The cutter will not depart until the Senior I&NS Officer has informed the Captain that all migrants have been cleared by the Haitian authorities.

Should any migrant make a claim to a fear of persecution during the processing, he will be removed to the cutter and processed under #3. Under no circumstances will the I&NS Officer permit the Haitian authorities to remove a possible asylee unless he is satisfied that there

is no basis to his claim after processing under #3. *Remember*, if there is any doubt whether a migrant does or does not have a well founded fear of persecution the migrant will be returned to the cutter and brought to the U.S. where an asylum claim may be made.

/s/ Harold L. Boyce
HAROLD L. BOYCE
Supervisory Interdiction
Operations Officer

DAILY ROUTINE AND RESPONSIBILITIES FOR THE I & NS TEAM, ABOARD U.S. COAST GUARD CUTTERS INVOLVED IN HAITIAN MIGRANT INTERDICTION OPERATIONS AT SEA

WORKDAY:

The regular workday will be from 8:00 am to 4:00 pm, Monday thru Sunday. There will be no days off unless the cutter is inport and the Captain grants shore leave to the crew. All calls to duty outside of the regular working hours, 40 hour week, will be reflected on the T&A's, for Interpreters as 45 ACT OT. Call back will be a minimum of two hours per the AM. The 3 Miami based CORAP Interdiction Officers, will charge all OT under AUO two exceptions:

(1) Per AM2988.05 (11a) the assigned 8 hours on Saturday and Sunday is not AUO and must be reflected on the T&A's as 45 ACT-OT.

(2) The actual time spent on an interdiction, when outside regular hours, will be reflected as 31 ACT-OT.

Time will start when you report for the boarding and stop after all of the migrants have been questioned, the necessary information logged and the decision made to either permit their entry or return them to their country.

The Interdiction Officer will maintain a record of his and the Interpreters time and send a message (form in the boarding bag) to the Interdiction Officer in Miami on the last Wednesday of each pay period. Any OT worked after the cable is sent, will be reported the next day period in the (last pay period only) block under object class z 142 & z 165, AUO will be shown in the (AUO prior pay period line).

QUARTERS:

Assigned quarters will be kept neat and clean in conjunction with roomates. Bunks will be made every morning and linen changed once a week on the assigned day for Officers. When space is available you will be billeted in Officers quarters with a CG officer or in Chiefs quarters. At times when space is at a premium you might have to be quartered in what is available.

MEALS:

You will eat in the wardroom. The Officer in Charge of the Officers mess will give you a bill before you leave, it must be paid at that time. While using the wardroom the same procedures used by the ships Officers will be used by the I&NS Officer and Interpreter.

LAUNDRY:

You may wash your clothes once a week on the assigned day for Officers. On the 378's, however, laundry is done by laundry room crew and your laundry should be left outside your room on the assigned day. Civilian clothers do not make out to well in the ships laundry and you might want to wash some of your clothes by hand. A bottle of detergent and an iron is kept in the boarding bag for this purpose. When empty, detergent can be purchased in GTMO.

SHIPS STORE:

The ships store is open every day on most cutters for about an hour. Tobacco, candy, toilet articles and various sundry items are available at reasonable prices. In GTMO the exchanges are open to I&NS personnel.

AUTHORIZED AREAS:

Most areas aboard are open to I&NS personnel, except the rooms marked on the door "RESTRICTED", they should be entered only on a need to enter basis and then

only when accompanied by a CG personnel who is authorized to enter the room. Machinery spaces should not be entered unless accompanied by an engine room member. While on the bridge I&NS personnel should not get in the way of duty crewmembers operating the ship.

SHORE LEAVE:

When in GTMO or Haiti, I&NS personnel are restricted to the same shore leave as the Officers and crew and must be back aboard the cutter one (1) hour before the time set for departure for muster.

SHIP DRILLS:

During routine drills the I&NS team must proceed to the wardroom and remain there until the drill is over. A lifeboat drill is the only exception, then you will report to your assigned lifeboat station and immediately don you lifejacket. You should memorize the exit procedures from your room in the event of a real fire or other emergencies when lights are out or the passageways are filled with smoke.

MUSTER:

The I&NS team will muster with the Operations section. Muster at sea will be after the noon meal about 1230 hours at fair weather parade (on the flight deck) or in inclement weather on the mess deck. Muster is always held prior to the departure of the cutter from port and always during a man overboard crisis.

CONDUCT:

The I&NS team will conduct themselves as gentlemen both on or off duty. Alcohol consumption is not permitted aboard the cutters. While ashore either in GTMO or HAITI the cutter is on standby and could be recalled at

any time for an interdiction or a SAR case. If a member of the team tends to remain ashore, a number must be left where he may be located. Excessive drinking ashore would have an impact on a team member[']s work if recalled for an interdiction an hour or two away, in view of this moderation would be the best policy. NOTE: An interpreter had to be dismissed from the service after excessive drinking while ashore in GTMO and HAITI, this prevented him from doing his job.

REPORTS

1. *DAILY LOG:*

There is a handwritten log book in the boarding bag. Make an entry each day of operations conducted. Be brief but mention all boardings and any unsual happenings. Note the weather, location of cutter and port calls. Always note the change of Officers and Interpreters and the change of cutters. When returning to Miami bring a copy of the log during your tour of duty aboard. The interpreter will use it to maintain the duplicate log in Miami.

2. *BOARDING LOG:*

All boardings, Haitian or others, must be recorded on the boarding log sheets. A copy of these must be brought back to Miami for the duplicate log.

3 *INTERDICTIONS:*

A list of the migrants and a brief boarding report (see I&NS boarding instructions) must be made for each boarding. A copy of both must be brought back to Miami and placed in the interdiction folder. It is not necessary to keep a copy in the boarding bag.

EXHIBIT G TO
DECLARATION OF JOHN W. CUMMINGS

MEMORANDUM

Subject Procedural Changes in the INS Asylum Pre-Screening Component of the AMIO

Date Mar. 1, 1991

To Leon Jennings
Chief, Asylum Pre-Screening Unit

and

Erich Cauller
Director, Miami Asylum Office

From Asylum Branch
CORAP

The purpose of this memorandum is to detail a series of changes in the conduct of INS asylum pre-screening responsibilities within the Alien Migrant Interdiction Operation (AMIO) authorized by Presidential Order 12324 of September 28, 1981.

Short-term and longer term changes were approved by the Deputy Commissioner on January 29, 1991. These changes were discussed directly with the Coast Guard and with other interested parties in the appropriate fora. The changes outlined below are those which can be made to elements solely within the administrative competence of INS. These are therefore effective immediately. Longer term changes involving substantially lengthened interviews will begin only after concurrence with the Coast Guard and other interested parties has been obtained. However, the pre-interview briefing (Attachment A) should precede all INS interviewing.

Short-term Changes Effective Immediately:

1. The INS role in the overall AMIO will be identified as "Asylum Pre-Screening," operating under the auspices of the CORAP Asylum Branch. The title of the Miami-based office should be Asylum Pre-Screening Unit, with Leon Jennings as Chief, Asylum Pre-Screening Unit, Miami. Mr. Jennings will report directly to the Director of Asylum, who is also his firstline supervisor. The title of other officers in the Unit will be "Asylum Pre-Screening Officer."

2. After the January 24 INS consultation with the Coast Guard here in Washington, DC, INS onboard procedures for interviewing interdicted aliens will be modified to include an opening presentation by the INS officer and his interpreter explaining the purpose of the ensuing interviews with INS (see draft, as Attachment A). This affirmative step is necessary to overcome the overwhelmingly negative atmosphere resulting from the actual interdiction which immediately precedes the INS interviews.

3. Interviews of smaller groups of interdicted aliens (i.e., vessels with less than 45-50 persons onboard) should be expanded to cover all 20 questions on the recommended interview sheet (Attachment B). For the moment, this means that no additional time is needed to complete onboard interviewing; at the same time, we will be able to test the results of using this longer questionnaire. These interviews should be extensively documented, with notes from each interview recorded on a separate form (see Attachment C).

4. Interviews of larger groups of aliens (i.e., vessels with more than 50 persons onboard) should use the current interview record form for note-taking (recording four interviews per page). However, even here, notes taken on this form should be greatly improved to better record each of the alien's replies and should be recorded in

the same detailed manner as affirmative ones. If the alien asserts or even hints at past difficulties at home, or at a possible fear of returning home for any reason, a more in-depth interview with the INS asylum pre-screening officer must be conducted to determine the extent and reasons of the fear and the credibility of the applicant. Each of these longer more in-depth interviews should be extensively documented on a separate form (see Attachment C, mentioned above).

5. We are aware of the increased burden the above changes will place on Service interpreters aboard the cutters. We understand that these interpreters not only interpret during the INS interviews, but then lend their expertise to the Coast Guard to convey essential information and instructions to the aliens and assist Coast Guard officers in maintaining order and control. We realize that this sometimes leads to very long days and strenuous working conditions. However, INS functions remain of primary import to the time of the interpreter; only if time permits, the interpreter can assist the Coast Guard as needed. The question of funding additional Unit interpreters is currently under review at Headquarters. In the meantime, the CORAP approved certification of current Service creole-speaking interpreters should be completed as expeditiously as possible.

6. A Summary Asylum Pre-Screening Interview Record (see Attachment D) should be completed at the end of every interdiction and sent to the Director of Asylum, INS/CORAP, with copies of all interview records attached within one week after the interdiction has been completed.

7. Aliens expressing credible fear of returning home should be routed to the United States to formally pursue an asylum claim before an Asylum Officer of the Miami Asylum Office. This standard (for transfer to the United States) is considerably less than the standard necessary to obtain asylum, but considerably more than the so-called

"frivolous"/"manifestly unfounded," threshold needed for employment authorization. INS officers on the Coast Guard cutter should telex or fax the name and other available bio-data to the relevant INS offices in Miami to conduct a name search, etc., prior to the alien's transfer to the United States. Procedures for such transfers to the United States should be worked out in the near future among the Asylum Pre-Screening Unit, the Miami Asylum Office and the Miami District Office. As necessary, these procedures may need ratification and/or coordination between the CORAP Asylum Branch and other interested offices in Headquarters.

8. Asylum Pre-Screening Officers and Asylum Officers in the Miami Asylum Office shoud be fully aware of the political, cultural, economic and social affairs of the interdicted alien's country of origin, of the current human rights situation existing there, and all recent developments. At a minimum, relevant reference materials should be solicited in writing, with copies kept for the files, from America's Watch (Human Rights Watch), Lawyers Committee for Human Right, Amnesty International and the National Coalition for Haitian Refugees.

9. Such interviewing officers should also be well-versed in asylum law and practice, especially aware of how eligibility under the statutory definition of refugee may be established in situations of general or even localized civil strife. Interviewing officers should be aware that the persecution feared could be from the government, or from a group the government is unwilling to control, or from a group the government is unable to control. An alien's specific, individualized and seemingly-targeted experiences and/or fears are controlling. Officers should be cautious about drawing facile conclusions of general civil strife to situations where such conclusions may be inappropriate. When in doubt, the interviewing officer should consult with his/her supervisor and/or with the Director of Asylum.

10. Any aliens brought to the United States should be paroled in the "public interest" into the care of an appropriate voluntary agency, such as the Haitian Refugee Center for Haitians. Modalities of this parole and the respective roles and responsibilities of the "custodial" voluntary agency and INS should be coordinated by the Miami Asylum Office. At a minimum, the voluntary agency would be responsible for care and maintenance and for arranging appropriate legal assistance in preparing a detailed request for asylum (I-589) and, when possible, an extensive supplementary statement regarding the specifics of an applicant's claim. The voluntary agency should also arrange for the services of a qualified interpreter for the applicant's interview.

11. Any interdicted alien brought to the United States should be interviewed as a matter of urgency; normally this should not exceed 10 working days from the date of parole into the United States. Any alien found ineligible for asylum should be immediately served a Notice to Alien Detained for Exclusion Proceedings (Form I-122), after which the alien could pursue his/her claim de novo before an Immigration Judge. This step is necessary to ensure that individuals with refugee-like characteristics are not unnecessarily detained, while those found ineligible for asylum are not kept in any limbo status while in the United States.

12. Monthly reporting formats and procedures will be modified in the near future to better reflect these changes.

13. Copies of all documentation regarding each interdiction should be sent as soon as completed to the Director of Asylum, INS/CORAP, for review. Written comments will be returned as appropriate to ensure that subsequent processing of interdicted aliens are conducted in accordance with existing policies and procedures.

/s/ Gregg A. Beyer
GREGG A. BEYER
Director of Asylum

Attachment A

Opening INS Statement to Interdicted Aliens

You have been picked up by the United States Coast Guard, operating in this area under an agreement between the United States Government and the Government of the Republic of Haiti. Your boat has been sunk because it has been found unseaworthy for the number of people that were on it and to prevent it from becoming a hazard to other ships in the area.

Those of you in need of medical attention or other special services should contact the INS interpreter immediately following this announcement for assistance. Food and some medical attention will be available to you.

Shortly, you will be interviewed by an officer of the United States Immigration and Naturalization Service. The Immigration Officer will ask you your name, date and place of birth, and occupation. He will also ask you questions regarding your departure, your intended destination, and your purpose in travelling. The Officer is an officer of the Political Asylum Branch of the Immigration Service in Washington, D.C.

Political asylum in the United States is available to persons who generally believe they would be harmed on return home. The Immigration Officer has received special training to assist in making this determination, assessing the merits of a claim and in judging the credibility of a claimant.

These interviews will be conducted completely in private, with an interpreter who is an American citizen with no connections to the Government of Haiti. The information you give, apart from your name and date and place of birth, will be kept strictly confidential.

The Immigration Officer will also ask you questions concerning any fears you may have in returning to your country of origin, such as who you fear and why you have this fear. Meanwhile, the ship will be returning to Port-

au-Prince, where most of you will be disembarked. Upon disembarkation, the Haitian Red Cross will assist you in your return home. Any person having a fear of returning to Haiti must express this fear to the Immigration Officer prior to the arrival of the cutter in Haiti.

The Coast Guard will be helping you to return home in safety and with dignity. No information other than your name, date and place of birth will be given to the Haitian authorities upon your disembarkation.

Attachment B

Asylum Pre-Screening Operation: Interview Questionnaire

Although indicative and not exhaustive, INS interviewers of aliens interdicted under the AMIO should cover the following subjects.

Answers to each subject should be summarized on separate Interview Summary Sheets (see Attachment C). Explanations and replies to questions during the interviews should be recorded on the form as accurately and as completely as possible.

Questions Eliciting Applicant Biographical Information:

1. What is your name?
2. Where were you born?
3. What is your country of origin/nationality?
4. Do you have a passport?
5. What kind of work do you do?

Questions Eliciting Reason(s) for Leaving:

6. Why did you leave (name of country)?
7. Have you ever had any problems with the authorities or other group(s) while in (name of country)? If so, please explain. If so, when was that?
8. Has anyone in your family or immediate neighborhood ever had any problems with the authorities or any other group(s)? If so, when was that? If so, what happened?
9. Have you or any member of your family ever been denied access to schools, or denied employment, or housing? If so, please explain. If so, when was that?

10. Have you ever been arrested or detained by the authorities or any other group(s) for any reason If so, please explain.
11. Has any member of your family ever been arrested or detained by the authorities or any other group(s) for any reason? If so, please explain. If so, when was that?
12. Do you feel you had to leave (name of country) for any reason? If so, please explain.

Questions Eliciting a Possible Fear of Return:

13. If you were to return to (name of country), would you return to your old neighborhood? If not, why? Could you get your old job back if you returned? If not, why not? Could you find someplace to live if you returned? If not, why not?
14. Is there any reason why you cannot return to (name of country)? If so, please explain.
15. What do you think would happen to you if you returned to (name of country)? Would you or any member of your family be harmed? or risk being harmed? If so, by whom? Why would they want to harm you? Please explain.
16. Have you or any member of your family ever done anything in (name of country) which you think might cause you problems if you were to return? If so, please explain.
17. Did you belong to any organization(s) in (name of country)? If so, what kind? Were you active? Does anyone have reason to think you might belong to any organizations they dislike or to impute to you membership in that organization or acceptance of those beliefs?

18. Have you heard of people in situations similar to yours being harmed in your area? Why were they harmed? How is your situation similar to theirs? Do you think you would be similarly harmed if you returned? If so, why?

19. What is your religion? Has anyone ever threatened you or caused you problems because of your religion or your religious beliefs?

20. Do you want to return to (name of country)? If not, why not?

Vessel: _____

ASYLUM PRE-SCREENING INTERVIEW RECORD

Sex	Name	DOB	POB	Address
:	:	:	:	:

_____

_____

Notes of the Interview:

1. Concerning the Claim:

2. Concerning Credibility:

Summary of Interview:

1. Occupation: _____
2. Reason(s) for Leaving _____
3. Fear of Return? If yes, explain: _____

_____

_____

4. Decision: Not a Genuine Asylum Seeker:
   Referral to U.S. for Asylum Processing:

Interdiction: ———/——— Attachment D

SUMMARY ASYLUM PRE-SCREENING
INTERVIEW RECORD

The following information is a summary of the person interviewed by INS (individual interview records are attached):

Date of Interdiction: _____

Interdiction Number: _____ / _____
(year) (number)

Name of Vessel Interdicted: _____

Name of Coast Guard Cutter: _____

Disposition of the Boat: _____

Name of INS Interviewing Officer: _____

Name of INS Interpreter: _____

Country/Countries of Departure: _____

_____

Place(s) of Departure From _____
(country) :

Place(s) of Residence In _____
(country) :

Number of Persons Interdicted: _____

Number of Persons Interviewed: _____

Results of Interviews:

Number Referred to US: _____

Number Return to _____
(country) :

Biographical Data:

Males: Total: ——; Adults:* ——; Minors:* ——

Females: Total: ——; Adults:* ——; Minors:* ——

(*=Minors are defined as under 16)

Main Occupations in _____: _____
(country)
_____
_____

Main Destination(s) Cities: _____
(country/countries)

EXHIBIT H TO DECLARATION OF
JOHN W. CUMMINGS

MEMORANDUM

Subject Asylum Pre-Screening

Date Nov. 22, 1991

To John Cummings
Assistant Commissioner,
Refugees, Asylum, and Parole

From Office of the Deputy Commissioner

The following is a reiteration of the standard set out in the March 1, 1991, guidelines for the INS Asylum Pre-Screening Program. This is the standard which should be followed when conducting the asylum pre-screening of interdicted aliens.

Definition of Credible Fear of Returning to the Country of Origin or Nationality for Asylum Pre-Screening

A credible fear of returning is defined as an apprehension or awareness, which appears to be truthful to an Asylum Pre-Screening Officer (APSO), of serious danger or threat of harm on account of race, religion, nationality, membership in a particular social group, or political opinion. The quantum of proof necessary to establish a credible fear of returning is less than that required to prove a well-founded fear of persecution. An applicant at the asylum-screening stage need only have a story that a reasonable person would believe to establish a credible fear, not the higher standard of establishing that a reasonable person in his or her circumstances would in fact have a fear.

The following list contains examples of acts which may render an applicant eligible under this program: Serious threats to life or freedom; deliberate imposition of serious economic hardship, so as to deprive a person of all means of earning a livelihood; constant surveillance; purposeful interference with a person's privacy, family, home, or correspondence; enforced social or civil inactivity; and pressure to become an informer.

An alien who is determined: 1) to have been convicted of an aggravated felony or a serious crime, 2) to have ordered, incited, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion, 3) to be a dual or multiple national who can avail himself or herself of the protection of a third state, or 4) to be a national of a country of which he or she has no fear of returning, shall not be eligible for consideration under the Asylum Pre-Screening Program.

Credibility Assessment

Each alien will be assessed individually for credibility. The details of the events related should be specific, internally consistent, and plausible in light of the reasonably available information on human rights conditions in the relevant country. Whenever deemed necessary by an APSO, he or she will request information from the Director of the Asylum Division on specific aspects of country conditions necessary to assess credibility in a particular case.

The APSO will take notes of the interview to determine whether a credible fear of returning has been established. If the APSO determines that an alien's claimed fear is not credible or that it is not on account of any of the enumerated grounds, the conclusion will state the reasons

for such a finding. The conclusion must be consistent with the notes of the interview.

Grounds for the "Fear" not Articulated

If the interview and a review of the asylum request fail to elicit evidence of fear of returning on account of any of the enumerated grounds, and the APSO believes that the claimant has a fear but is unable to articulate the reason for such fear, the APSO should ask the following questions:

Why did you leave your country?

What do you think would happen to you if you returned to ————?

Why do you wish to come to the United States?

Have you had any problems with the authorities or other group(s) while in ————? If so, please explain. If so, when was that? Do you know anyone else who has had problems with the authorities or other group(s) while in ————?

Have you ever been arrested or detained for any reason? Do you know anyone who has?

If you went back to ————, where would you live and work?

Are you afraid to return? If so, why?

Have you or any member of your family ever done anything in ———— which you think might cause you problems if you were to return? If so, please explain.

Did you belong to any organization(s) in ————?

Do you know anyone from ———— who has been harmed for any reason?

/s/ Ricardo Inzunza
RICARDO INZUNZA
Deputy Commissioner

EXHIBIT I TO DECLARATION OF JOHN W. CUMMINGS

ASYLUM PRE-SCREENING: GUANTANAMO BAY

OBJECTIVE: In light of what is known about current country conditions to identify interdicted asylum seekers expressing fear of return based on characteristics and/or circumstances which might lead a reasonable person to fear being targeted upon return to Haiti for possible persecution on account of race, religion, nationality, membership in a particular social group or political opinion.

(References: INS Director of Asylum Memorandum of March 1, 1991, INS Deputy Commissioner Memorandum of Nov. 22, 1991 and Interview Record).

The INS Pre-Screening decision, however, does not imply that the Asylum Pre-Screening Officer (APSO) *excludes* the possibility of returnees being harmed on account of personal vendetta, random violence or civil strife, either at home or upon their return by the USG to Port-au-Prince.

PRE-SCREENING CATEGORIES:

1.— Little or no fear expressed: departure primarily for economic reasons.

2.— Fear expressed, but on account of personal vendetta, general conditions, random violence or civil strife.

3.— Fear expressed, but details do not establish credibility of the claim and/or its nexus to one of the five statutory grounds.

4.— Fear expressed and details establish credibility and its nexus to one of the five statutory grounds.

/s/ Gregg Beyer

EXHIBIT J. TO DECLARATION OF JOHN W. CUMMINGS

Memorandum

Subject Interviews of "Screened In" Persons Subject to Medical Exclusion

Date February 29, 1992

To John Cummings
INS/GTMO

From Grover Joseph Rees[,] General Counsel

As you know, there are a number of persons at the naval base in Guantanamo who have been "screened in" as possible refugees but who have been determined to have a communicable disease of public health significance.

The Immigration and Nationality Act (INA) requires that persons with communicable diseases of public health significance "shall be excluded from admission into the United States." INA § 212(a)(1). With respect to persons who are determined to be refugees, however, the Act provides that the Attorney General may waive the medical exclusion "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest." *Id.* § 207(c)(3). Such a waiver must be in writing and shall be granted only on an individual basis following an investigation. *Id.*

The Act further provides that the Attorney General may temporarily parole aliens into the United States "for emergent reasons or for reasons deemed strictly in the public interest." *Id.* § 212(d)(5)(A). Such parole does not constitute an admission into the United States and confers no immigration or refugee status. *Id.* Moreover, a person who is a refugee may be paroled into the United States (rather than admitted as a refugee under the formal refugee admission process) only when the Attorney

General finds parole to be "require[d]" by "compelling reasons in the public interest." *Id.* § 212(d)(5)(B).

With respect to a person whose application for parole is premised on the possibility that he or she may be a refugee, but who has been determined to have a communicable disease of public health significance, the judgment with respect to whether parole is required by "compelling reasons in the public interest" should be informed by the same factors that would justify a waiver of the medical exclusion if the person were to seek admission as a refugee. That is, the waiver must be justified "for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest." *Id.* § 207(c)(3). At a minimum, this requires a determination that the person is in fact a refugee.

Accordingly, any person "screened in" as a possible refugee who has been determined to have a communicable disease that is not curable should be given an interview to determine whether he or she is a refugee within the definition of INA § 101(a)(42). In the case of a Haitian national in Guantanamo, this definition requires a finding that the person is unable or unwilling to return to Haiti because of a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. This finding is identical to that required to grant asylum or refugee status. The interview should therefore be identical in form and substance, or as nearly so as possible, to those conducted by asylum officers to determine whether asylum should be granted to an applicant already in the United States.

Interviews should be conducted according to the usual standards and techniques for asylum interviews. *See* Interview Checklist, INS Asylum Branch Procedures Manual and Operations Instructions, p. 121 (March 1992). An Asylum Assessment should be prepared for each applicant, in accordance with the assessment format set

forth in the Procedures Manual and Operations Instructions. *See id.* at 124-25. All assessments should be forwarded to the Director of the Asylum Branch. When the interviewing asylum officer determines that an applicant is not credible, or that the facts adduced in the interview are insufficient, even if true, to establish a well founded fear of persecution within the definition of the Act, this determination should be noted in the assessment along with the reasons therefor. When the interviewing officer determines that an applicant appears credible and that the facts adduced would, if true, establish a well founded fear of persecution, the assessment will be forwarded to the State Department for information concerning the accuracy of the applicant's assertions about his or her experiences and about country conditions. *See* 8 C.F.R. § 208.11.

These procedures should be followed only with respect to persons whose communicable diseases of public health significance are not curable. Persons whose diseases are susceptible of prompt treatment, and cure, and who would not thereafter be medically excludable, should be handled in accordance with established procedures pending further guidance.

EXHIBIT K TO DECLARATION OF
JOHN W. CUMMINGS

PART III, ATTACHMENT B

INTERVIEW CHECKLIST

INCLUSION

——UNWILLING/UNABLE TO RETURN

——SUBJECTIVE FEAR (What indications of genuine fear?)

——OBJECTIVE BASIS (Past Persecution?)

——PERSECUTION OF OTHERS SIMILARLY SITUATED

——Any pattern or practice of persecution in country? What happened? Who did it?

——WELL-FOUNDED

——Belief or characteristic persecutor seeks to overcome?

——Is persecutor aware or could he become aware of this?

——Is persecutor capable and/or inclined to punish applicant?

——Is fear based upon one of five (5) grounds?

——Would a "reasonable person" fear? (fear may be "significantly less than clearly probable")

——CREDIBILITY

——Is testimony believable, consistent, detailed?

——Obtain explanations of all issues which put credibility in doubt

—If found not credible, explain why

MANDATORY BARS EXCLUSION

——PERSECUTOR

——PARTICULARLY SERIOUS CRIME INSIDE U.S./ AGGRAVATED FELONY

——SECURITY RISK

——FIRM RESETTLEMENT (Relevant only to asylum, not withholding)

DISCRETION (ONLY WITH ASYLUM,)
NOT WITHHOLDING)

——PARTICULARLY SERIOUS CRIME OUTSIDE U.S., FRAUD, AVOIDANCE OF REFUGEE PROCESSING

——MUST BALANCE ANY NEGATIVE FACTORS WITH POSITIVE FACTORS SUCH AS POSSIBILITY OF PERSECUTION, FAMILY TIES IN U.S., etc.

ADDTIONAL MANDATORY BARS—
WITHHOLDING ONLY

——Conviction of praticularly serious crime outside U.S.

——Reasons to believe a serious, non-political crime outside U.S.

EXHIBIT L TO DECLARATION OF
JOHN W. CUMMINGS

PART III, ATTACHMENT C-1

ASSESSMENT SHEET

BHRHA/ASY
DEPARTMENT OF STATE
ROOM 7802
WASHINGTON, D.C. 20520

APRU
MAIN JUSTICE
ROOM 6213
WASHINGTON, DC 20520

DATE _____

ATTACHED ARE COPIES OF A REQUEST FOR ASYLUM (I-589) AND SUPPORTING DOCUMENTATION FOR THE BELOW ATTACHED ALIEN.

APPLICANT: _____

A-NUMBER: _____

COUNTRY: _____

INS OFFICE: _____

ADDRESS: _____

_____

_____

INTERVIEWER'S NAME: _____

_____

FROM: BHRHA A-NUMBER _____

TO: _____

☐ BHRHA HAS REVIEWED THE APPLICATION IN THE ABOVE CASE AND HAS NO ADDITIONAL INFORMATION OR ANALYSIS.

☐ BHRHA COMMENTS ON THE ABOVE CASE ARE ATTACHED.

A-NUMBER: ———

ASSESSMENT SHEET

PRELIMINARY ASSESSMENT: (Complete for *ABC* cases only)

—— Grant
—— Deny

REQUEST BASED ON:

—— Race
—— Nationality
—— Religion
—— Political Opinion
—— Membership in Particular Social Group

DOCUMENTS:

—— Specific
—— Generalized
—— Relevant
—— Irrelevant
—— No Documentation

VERBAL TESTIMONY:

—— Specific
—— Generalized
—— Consistent with I-589
—— Inconsistent with I-589 (explain below)
—— Credible
—— Not credible

SUMMARY:

PART III, ATTACHMENT C-2

ASSESSMENT—WRITING FORMAT

I INTRODUCTION

Applicant is a —— year old (male/female) native and citizen of country who entered the United States on *date* and was admitted as a status (*or* entered without inspection).

II BASIC LEGAL CLAIM

A) WHO does the applicant fear?

—Government organization

—Non-government organization

—Individual

B) WHAT does applicant fear?

—Type of harm or mistreatment

C) "On account of"

—Indicate upon which of the enumerated grounds the claim is based

EXAMPLES:

Applicant bases his claim for asylum on political opinion because he fears the government wants to harm him for his refusal to join the military.

Applicant is afraid that the police will imprison her because of her religion and political opinion.

Applicant is afraid that the military will harm him on account of imputed political opinion.

III APPLICANT'S TESTIMONY—An elaboration of the basic legal claim

—Describe the factual account supporting applicant's claim

—Chronological order is useful

—Indicate why applicant is afraid

—Is applicant afraid of being singled out for persecution?

—Is there a pattern or practice of persecution of people similarly situated to applicant?

IV COUNTRY CONDITIONS

Include background material on general country conditions. Do general country conditions support the applicant's story?

V CREDIBILITY

Is story detailed? specific? internally consistent?

VI LEGAL ANALYSIS/CONCLUSION

Apply the law to the facts of the case. Does applicant have a well-founded fear?

STYLE FOR WRITING ASSESSMENTS

In the Decision Writing Course you were given a format for writing assessments. You were told that the assessment was to be streamlined so that it could easily be converted to a Notice of Intent to Deny, if a denial was contemplated. This paper will suggest a writing style to be used when preparing decisions on asylum applications.

The basic rule is to remember that the writing is used to respond to an applicant's request for asylum in the United States. The difficulty in preparing these decisions comes from the need to insert case citations and references to regulation in the body of the decision. The challenge is to write in a style that can be understood by the applicant and still contain the necessary legal basis. Here are some helpful hints:

1. Choose words that are in common usage.
2. Avoid "loaded terms" which may have a meaning in Immigration Law which is unrelated to normal usage. For example, "persecuted" is a legal conclusion in our work and should be used only when you have determined that it meets our definition.
3. Use case citations only when the holding actually fits the facts of the case on which you are working. Your legal analysis will usually occur in the concluding paragraphs of the assessment and Notice of Intent to Deny.
4. Be as a concise as possible without losing legal sufficiency.
5. Notices of Intent to Deny and Final Denials do not need to be written in an accusatory style. The applicant has not violated any law by applying for asylum.
6. Write simple declaratory sentences.

7. Organize your thoughts by referring to your notes before writing the decision.

8. Avoid generalizations. We want to address the facts unique to each case.

Your decisions will be reviewed by your supervisor and will be open to review by Headquarters, State Department, the Asylum Policy and Review Unit, and the Immigration Judges. Your goal is to write clear and understandable decisions which will withstand legal challenges and public scrutiny.

DEFENDANTS' EXHIBIT NO. 148

Letter from Edwin D. Williamson to Timothy E. Flanigan, Dec. 11, 1991

Memorandum for Edwin D. Williamson from Timothy E. Flanigan, Dec. 12, 1991

UNITED STATES DEPARTMENT
OF STATE

The Legal Adviser
Washington, D.C. 20520

December 11, 1991

Mr. Timothy E. Flanigan
Acting Assistant Attorney General
Office of Legal Counsel
U.S. Department of Justice
10th and Constitution Avenue, N.W. 20530
Rm. 5224

Re: *Haitian Refugee Center, Inc. v. Baker*

Dear Tim:

I am writing to provide you with the formal opinion of the Department of State on the question whether the *non-refoulement* obligation of Article 33 of the 1951 U.N. Convention Relating to the Status of Refugees ("the Refugee Convention")[1] imposes obligations on the United States with respect to refugees outside United States territory. We have previously and publicly taken the position that the obligation applies only to persons within the territory of a Contracting State. This remains our firm view. For the reasons indicated below, the Department respectfully requests that you reconsider and withdraw the apparently contrary legal conclusion reflected in the

[1] The United States never became a party to the Refugee Convention. In 1957, the United Nations completed a Protocol to the Refugee Convention that incorporated Articles 2-34 of the Convention and removed the temporal and geographic limitations on the definition of "refugee" contained in Article 1 of the Convention. The United States acceded to the Protocol on November 1, 1988, and as a result is bound by Article 33 of the Refugee Convention. 19 U.S.T. § 223, T.I.A.S. No. 6577, 606 U.N.T.S. 267.

opinion of the Office of Legal Counsel of August 11, 1981. In view of the importance of this conclusion to the litigation noted above, we request that you provide us with your views in as expeditious a manner as possible.

The relevant principles for interpreting a treaty are accurately reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, U.N. Doc. A/Conf. 39/27 (1969) ("Vienna Convention"). Although the United States has not ratified the Vienna Convention, it is a signatory. A number of U.S. courts have applied those articles in interpreting treaties in cases before them. *Day* v. *Trans World Airlines, Inc.*, 528 F.2d 31, 36 (2d Cir. 1975), *cert. denied*, 429 U.S. 590 (1976); *Coplin* v. *United States*, 6 Cl. Ct. 115 (1984); *rev'd on other grounds*, 761 F.2d 688 (Fed. Cir. 1985); *Aeriliens* v. *Regan*, 817 F. Supp. 1082, 1086 n.15 (Ct. Int'l Trade 1985); *Darby* v. *Seaboard World Airlines, Inc.*, 575 F. Supp. 1134, 1138 (E.D.N.Y. 1983), *rev'd on other grounds*, 737 F.2d 172 (2d Cir. 1984).

Under Article 31 of the Vienna Convention, the starting point of treaty interpretation is "the ordinary meaning" of the terms of the treaty in their context, and in light of the object and purpose of the treaty. The context includes, among other things, "[a]ny agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty." Also to be considered is the subsequent practice in applying the treaty if the practice "establishes the agreement of the parties" regarding the treaty's interpretation. Under Article 32, the negotiating history of a treaty may also be consulted, either to confirm the results of an analysis under Article 31 or if the analysis under Article 31 leaves the meaning ambiguous or leads to an absurd or unreasonable result. These principles all lead to the conclusion that Article 33 of the Refugee Convention did not create obligations on States with respect to refugees outside their territory.

The Text and Negotiating History of Article 33

Article 33 provides as follows:

> 1. No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a social group or political opinion.
>
> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of the particularly serious crime, constitutes a danger to the community of that country.

The word "expel" in Paragraph 1 clearly refers to the treatment of refugees in a State's territory. Paragraph 2 also clearly refers to refugees in a State's territory in excluding certain refugees from the protection of Paragraph 1.

Article 33 also uses the word "return." The French term for the word "return" is included in the official English version of the treaty, a drafting device indicating that the word "return" is to be understood as synonymous with the French "refouler."[2] The French was included in the English text for the express purpose of ensuring that the word "return" would be understood as applying only to refugees within a State's territory. During the final negotiating session for the Refugee Convention in July 1951, the Conference of Plenipotentiaries (representing 26 States, including the United States) directly confronted the questions of how the word "return" in Article 33 (which was then Article 28) would be interpreted. At the session of July 11, the Swiss representative noted that the French word "*refoulement*" had some ambiguity, but that it "could not . . . be applied to a refugee who had not yet entered the territory of a country." The Swiss representative also expressed concern that Article 33 would be read to "impl[y] the existence of two categories of refugees: refugees who were liable to be expelled, and those who were liable to be returned." He therefore thought it essential that the drafting States "take a definite position with regard to the meaning to be attached to the word 'return'" and stated his government's understanding that the word "return," like the word "expel," in fact "applied solely to refugees who had already entered a country, but were not yet resident there."

The Swiss representative made clear that his country's assent would depend on being assured of this reading, one implication of which would be that Article 33 would not require a state "to allow large groups of persons claiming refugee status to cross its frontiers." The representative of France affirmatively agreed with this interpretation and indicated that "[i]t was only the idea of what was generally meant by 'expulsion' that should be retained." The negotiating record for that day reflects no disagreement with this view.[3] U.N. GAOR Conference of Plenipotentiaries on the Status of Refugees and

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[2] The French text of article 33(1) reads as follows:

> Aucun des Etats Contractants n'expulsera ou ne refoulera, de quelque maniere que ce soit, un refugie sur les frontieres des territoires ou sa vie ou sa liberte serait meances en raison de se race, de sa religion, de sa nationalite, de son apparienence a un certain groupe social ou de ses opinions politiques.

[3] At an earlier and lower level stage in the drafting, when the Convention was being considered by an Ad Hoc Committee, the expert from the United States expressed the view that Article 33 should cover non-admittance at the frontier. The United States had different representation at the Conference of Plenipotentiaries and this view was apparently not reasserted by the United States. In any event, this view was not adopted by the Conference.

Stateless Persons (16th mtg.) at E, U.N. Doc. A/CONF. 2/SR.16 (1951).

The limited meaning of the word "return" in Article 33 was reaffirmed at the second and final reading of the draft Convention, on July 25, 1951. The negotiating record for that day records that the Dutch representative recalled the eariler discussion as follows:

> The Swiss representative had expressed the opinion that the word "expulsion" related to a refugee already admitted into a country, whereas the word "return" (*"refoulement"*) related to a refugee already within the territory but not yet resident there.

The Dutch representative went on to say that this was an important point for his government because of its implications with respect to "large groups of refugees seeking access to its territory." Noting that the representatives of Belgium, Germany, Italy, the Netherlands, and Sweden, as well as Switzerland, had supported this interpretation, he asked that it be placed on the record.

The President of the Conference ruled that the interpretation should be placed on the record since no objection had been expressed. The British delegate added that the word "return" had been chosen as the nearest equivalent to *"refoulement,"* and that he understood that the word "return" in this context had no broader meaning—*i.e.*, no meaning broader than the French, which had already been clarified as applying only to a refugee within the territory. The President then suggested that the French word be included in brackets whenever the word "return" was used. U.N. GAOR Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons (35th mtg.) at 21-22, U.N. Doc. A/CONF.2/SR.35 (1951). The final text of Article 33 was adopted by a vote of 20 for, 0 against, and 3 abstentions. *Id.* at 25.

In short, the negotiating history reflects a deliberate consideration of the meaning of the word "return," a

clear understanding that it referred only to refugees within the State's territory, and a related understanding that Article 33 created no obligations with respect to refugees outside the territory, including no obligation to refugees massing at the border. A number of countries whose support for the Convention was of critical importance would never have agreed to Article 33 but for the explicit rejections of the possibility of reading "return" to apply to refugees outside their territory.

This record is dispositive, whether it is taken under Article 31 of the Vienna Convention to reflect an "agreement relating to the treaty" made between all the parties in connection with its conclusion, to confirm an "ordinary meaning" analysis, or to resolve an ambiguity.[4]

In *Haitian Refugee Center, Inc.* v. *Gracey*, 809 F.2d 394 (D.C. Cir. 1987), Judge Edwards, the only judge to have considered the issue, concluded unequivocally—and with specific reference to the Haitian interdiction program at issue here—that "Article 33 in and of itself provides no rights to aliens outside a host country's borders." *Id.* at 840 (Edwards, J., dissenting in part and concurring in part). The other judges did not reach the merits, voting to dismiss on standing grounds.

Furthermore, the Supreme Court has observed that the United States acceded to Article 33 based upon the view that existing U.S. immigration legislation already provided the protections required by it; that Article 33 could be implemented through the then existing section 243(h) of the Immigration and Nationality Act, 8 U.S.C. § 1253(h) (1976); and that section 243(h) applied only

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[4] Reading "return" as applying to refugees outside the territory would lead to the absurd result that a refugee on the high seas would have more protection than a refugee already in the territory of a State, since Article 33(2)'s exception to the non-refoulement obligation for a refugee who is a danger to the State can only be invoked if the refugee is in the country.

to deportation of refugees already in the United States. *See INS* v. *Stevic*, 67 U.S. 407, 415, 417-18 (1984).

Subsequent Practice

The protracted and unsuccessful international effort to supplement the Refugee Convention with a Convention on Territorial Asylum, a central goal of which was to codify a prohibition against rejection of refugees at the frontier, further evidences an understanding of the limitations of the Refugee Convention and demonstrates the reluctance of the international community to broaden its legal commitments in the area of refugees and immigration.

The effort to draft a territorial asylum convention was preceded by adoption of the non-binding Declaration on Territorial Asylum by the U.N. General Assembly in December 1967. Paragraph 1 of Article 3 of the Declaration carried forward Article 33's usage of the words "expel" and "return" to refer to persons within the territory of a State. Paragraph 1 is broader than Article 33, however, in that it also includes an explicit prohibition against rejection at the frontier:

> 1. No person [entitled to seek and enjoy asylum from persecution] shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State in which he may be subjected to persecution.
>
> 2. Exception may be made to the foregoing principle only for overriding reasons of national security or in order to safeguard the population, as in the case of a mass influx of persons.

G.A. Res. 2312, 22 U.N. GAOR Supp. (No. 16) at 81, U.N. Doc. A/6716 (1967).

It was clearly understood that the Declaration's non-binding "prohibition" on rejection at the frontier, even as limited, went beyond the Convention's Article 33 obligation. *See* Weis, *The United Nations Declaration on Territorial Asylum*, 7 Can. Y.B. Int'l L. 92, 142 (1969). Thus, one distinguished commentator said that, "Article 3(1) of the Declaration on Territorial Asylum, 1967, corresponds to Article 33(1) of the Refugee Convention, but *it extends the rule* to include the prohibition of rejection at the frontier as well." A. Grahl-Madsen, *An International Convention on Territorial Asylum* 33 (2d ed., rev., 1976) (emphasis added).

Work on principles of asylum continued after 1967 with a view toward a binding instrument that would, among other things, extend the precept of *non-refoulement* to protection against rejection at the frontier. Private sector drafting efforts eventually resulted in a draft convention being submitted to the U.N. High Commissioner for Refugees and subsequently to the U.N. Economic and Social Council and, finally, the General Assembly ("UNGA"). The UNGA established a Group of Experts that met in 1975 and then called a Conference of Plenipotentiaries to meet in 1977.

The draft text submitted to the Group of Experts included an obligation for States to use their "best endeavours to grant asylum" to refugees (defined somewhat more broadly than in the Refugee Convention). Article 2 also included the following proposed provision:

> No person shall be subjected by a Contracting State to measures such as rejection at the frontier, return, or expulsion, which would compel him to return directly or indirectly to, or remain in a territory with respect to which he has well-founded fear of persecution, prosecution or punishment . . . .

U.N. Group of Experts on the Draft Convention on Territorial Asylum, *Draft Convention on Territorial Asylum*

at 4, U.N. Doc. A/AC.174/CRF.1 (1975). A later draft continued the separate treatment of the concepts of "rejection at the frontier" and "return" or "expulsion". *See* U.N. GAOR Office of the United Nations High Commissioner for Refugees, *Elaboration of a Draft Convention On Territorial Asylum, Report of the Secretary-General* at 1, U.N. Doc. A/10177/Corr.1 (1975).

The Group of Experts had difficulties with this Article, which it recognized as the most important provision in the draft convention. It settled on a proposed re-wording that became Article 3 and read in part as follows:

> No person entitled to the benefits of this Convention who is in the territory of a Contracting State shall be subjected by such Contracting State to measures such as return or expulsion which would compel him to return to a territory where his life or freedom would be threatened. Moreover, a Contracting State shall use its best endeavours to ensure that no person is rejected at its frontiers if there are well-founded reasons for believing that such rejection would subject him to persecution, prosecution or punishment . . . .

The proposed revision went on to provide for exceptions similar to those contained in Article 33 of the Refugee Convention. U.N. Group of Experts on the Draft Convention on Territorial Asylum, *Report* at 16, 34, U.N. Doc. A/AC.174/MISC.3/GE.75-6119 (1975); *Elaboration of a Draft Convention on Territorial Asylum, Report of the Secretary General* at 1, U.N. Doc. A/10177/Corr.1 (1975).

Significantly, the initial proposal to reword this provision came from the United States, which took the position that "the principle of non-refoulement . . . should only apply to persons in the territory of a Contracting State" and that "with regard to rejection at the frontier, the principle of non-refoulement should not be expressed in absolute terms but that the words 'use their best endeavours' should be employed." *Report* at 14, U.N. Doc. A/AC.174/MISC.3/GE.75-6119. *Compare* Proposal by the Expert of the United States, U.N. Doc. A/AC.174/Informal Working Paper No. 4 (1975) with *Report* at 14-16, U.N. Doc. A/AC.174/MISC.3/GE.75-6119. *See also*, 1975 *Digest of United States Practice in International Law* 156-58.

Efforts to conclude the convention were eventually abandoned, as the Conference on Plenipotentiaries on the Draft Convention on Territorial Asylum failed to adopt the Convention. This record clearly demonstrates that States—including the United States—did not regard Article 33 of the Refugee Convention as protecting refugees outside their territory, and that they were unwilling to assume such an obligation as a matter of international law.

The United States Understanding at the Time of Ratification

When President Johnson sent the Protocol to the Senate in 1968, he stated that it would require no changes in domestic law. Special Message to the Senate Transmitting the Protocol Relating to the Status of Refugees, 2 *Pub. Papers* 428 (1968). The Report of the Secretary of State, which accompanied the President's message to the Senate, specifically indicated that Article 33 of the Refugee Convention was comparable to section 243(h) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1253(h) (1976), and that it could be "implemented within the administrative discretion provided by existing regulations." S. Exec. K, 90th Cong., 2d Sess. VIII (1968). Section 243(h) at that time explicitly applied only to refugees within the United States:

> The Attorney General is authorized to withhold deportation of any alien *within the United States* to any country in which in his opinion the alien would

> be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reasons.

(emphasis added). In short, it was clearly understood at the time of ratification that Article 33 imposed an obligation only with respect to refugees already within the United States.

Subsequent Interpretive Statements

U.S. obligations under the Convention and Protocol were reviewed after a November 1970 incident in which a Lithuanian seaman (Kudirka) jumped ship in U.S. territorial waters but was turned back to the Soviets by the U.S. Coast Guard. This review culminated in the issuance of new guidelines by the Department of State for the treatment of defectors. These guidelines contained a statement that, as a party to the Protocol, "the United States has an international treaty obligation for its implementation *within areas subject to the jurisdiction of the United States.*" Department of State Bulletin 124-25 (Jan. 31, 1972) (emphasis added).

The limited territorial applicability of Article 33 was recalled again in connection with consideration of what became the Refugee Act of 1980. The bill as it emerged from the Senate and the House of Representatives in 1979 contained proposed amendments to Section 243(h) of the I.N.A. that essentially tracked the language of Article 33. The House report noted, in explaining the amendment, that the U.N. Protocol "seeks to insure fair and humane treatment for refugees *within the territory of the contracting states*," and said that the House amendment "conforms United States statutory law to our obligations under Article 33 . . . ." House Comm. on the Judiciary, *The Refugee Act of 1979*, H.R. Rep. No. 608, 96th Cong., 1st Sess. 17 (1979) (emphasis added).

A similar understanding of the territorial limits of Article 33 was expressed by the Department of State to

Congress in 1980 during hearings on the situation in Liberia and the question of diplomatic asylum. At these hearings, the Deputy Legal Adviser for the Department testified, "The obligation of a party to the Protocol . . . is not to return an applicant for asylum who presents his claim for asylum inside the territory of the United States." *The Situation in Liberia, Spring 1980-Update; Hearing before the Subcomm. on Africa of the House Comm. on Foreign Affairs*, 96th Cong., 2nd Sess. 10 (1980) (testimony of William T. Lake, Deputy Legal Adviser, U.S. Dep't of State).

For reasons unclear, in connection with institution of the Haitian Interdiction Program, the Office of Legal Counsel appears to have concluded that Article 33 applied outside U.S. territories. The issue, however, was not thoroughly analyzed in that opinion.[5]

In 1985, in connection with the filing of the brief for the United States as defendant-appellee in *Haitian Refugee Center, Inc.* v. *Gracey*, 809 F.2d 794 (D.C. Cir. 1987), the Department reviewed, elaborated, and concurred in arguments made by the Department of Justice to the effect that Article 33 does not protect refugees outside the territory of the United States.

In 1989, the Department of State testified before the House Committee on the Judiciary Subcommittee on Immigration, Refugees and International Law concerning the Haitian Interdiction Program, and again stated its view that Article 33 does not impose obligations on States with respect to refugees outside their territory. *Haitian Detention and Interdiction: Hearing Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 36-43 (1989) (statement of Alan J. Kreczko, Deputy Legal Adviser, Dep't of State). Later that year the United States also stated this position clearly on the

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[5] *See Proposed Interdiction of Haitian Flag Vessels*, 5 Op. Off. Legal Counsel 242, 248 (1981).

record at the annual meeting of the Executive Committee of the U.N. High Commissioner for Refugees. This statement was reported in the official record of the meeting as follows:

> As a matter of practice the United States authorities did not return persons who were likely to be persecuted in their countries of origin, and on their arrival at the border they were all given the opportunity to make an asylum claim. That was the practice, and in fact the policy of the United States, and not a principle of international law with which it conformed. . . .
>
> Although the United States was pursuing a policy based on humanitarian considerations, that policy was not inspired by any international obligation. It did not consider that the non-refoulement obligation under article 33 of the Convention included an obligation to admit an asylum-seeker. The obligation contained in the Convention pertained only to persons already in the country and not to those who arrived at the frontier or who were travelling with the intention of entering the country but had not yet arrived at their destination. Furthermore, there was nothing to suggest that an obligation to admit asylum-seekers had ripened into a rule of customary international law.

Executive Committee of the High Commissioner's Programme, *Summary Record of the 442nd Meeting* at 16, U.N. Doc. A/AC.96/SR.442 (1989). No disagreement with this view was expressed.

Our view is not changed by the fact that the U.N. High Commissioner for Refugees ("UNRCR") now advocates recognition of an extraterritorial norm of *non-refoulement*.[6] UNRCR was established by the U.N. General Assembly even before the Refugee Convention was completed, *and* has never been charged with a definitive role in the interpretation of the Convention. That role is given to the International Court of Justice by Article 38 of the Convention and by Article IV of the Protocol. Similarly, the consensus-based Executive Committee ("EXCOM") of UNRCR (comprised of States both party and non-party to the Refugee Convention, *and* of States party to additional, more expansive conventions) has no authority to interpret legal obligations of States. UNRCR itself has recognized that the EXCOM conclusions have no legal effect, but instead provide guidance for States in developing their policies on refugee issues. *Statement of Mr. Arnaout, Director, Division of Refugee Law and Doctrine, UNRCR*, in Executive Committee of the High Commissioner's Programme, *Summary Record of the 431st Meeting* at 11-12. U.N. Doc. A/AC.96/53.431 (1988).

[6] Prince Sadruddin Aga Kahn recognized during his tenure as U.N. High Commissioner for Refugees that there was no obligation of *non-refoulement* with respect to refugees outside a State's territory. S. Aga Kahn, *Lectures on Legal Problems Relating to Refugees and Displaced Persons given at the Hague Academy of International Law* (August 4-6, 1976) 25-26. *See also* G. Goodwin-Gill, *The Refugee in International Law*, 75 & n.26 (1983).

Summary

Article 33 of the Refugee Convention was completed on the understanding that it would not have extraterritorial effect. This understanding has been confirmed by subsequent practice by States party to the Convention and Protocol, particularly in the context of considering the draft Convention on Territorial Asylum. The United States has repeatedly recognized the limited scope of Article 33, including in 1968, at the time of accession to the U.N. Protocol; in 1972, after the Kudirka incident; in 1975, while considering the draft Convention on Territorial Asylum; in 1979-80, during consideration of the Refugee Act of 1980 and the situation in Liberia; and

consistently since 1985. Contrary interpretations apparently made in 1981 are in error. Again, in light of the pending litigation, we would appreciate receiving the views of your office as soon as possible.

Sincerely yours,

/s/ Edwin D. Williamson
EDWIN D. WILLIAMSON

U.S. DEPARTMENT OF JUSTICE
Office of Legal Counsel

Washington, D.C. 20510

December 12, 1991

Office of the
Assistant
Attorney General

MEMORANDUM FOR EDWIN D. WILLIAMSON
Legal Adviser
Department of State

Re: *Article 33 of the Refugee Convention*

We have reviewed your letter opinion dated December 11, 1991, in which you conclude that Article 33 of the 1951 United Nations Convention Relating to the Status of Refugees (Refugee Convention) does not impose any domestic legal obligations on the United States with respect to individuals interdicted outside its territory as part of an effort to control mast illegal migration to the United States. Letter from Edwin D. Williamson to Timothy E. Flanigan, December 11, 1991 (Williamson Letter). For the reasons outlined in your letter and for the additional reasons discussed below, we concur in your conclusions.

The United States adheres to Articles 2 through 34 of the Refugee Convention by virtue of the Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223 (the Protocol), to which the United States acceded on November 1, 1968. The official English version of Article 33 provides in part:

> No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom

> would be threatened on account of his race, religion, nationality, memebrship of a particular social group or political opinion.

19 U.S.T. at 6276. Article 33 thus imposes an obligation on the contracting parties not to "expel or return ("refouler")" refugees under certain circumstances.

The word "expel" in Article 33 clearly refers to the treatment to be afforded potential refugees found within a state's territory. Paragraph 1 also uses the word "return," followed by the French term "refouler." As you note in your letter, the history behind the insertion of "refouler" in the Convention demonstrates that the representatives of the nations that negotiated the Convention intended that the English word "return" not be construed so as to make the treaty applicable to persons outside the territory of a contracting state. Williamson Letter at 3-5.[1] Because both "expel" and "return ("refouler")" refer only to the treatment to be afforded individuals found within the territory of a contracting state, the Refugee Convention and the Protocol do not impose any legal obligation with respect to individuals interdicted outside the United States.

The Supreme Court, in its review of the legislative history of the United States' accession to the Protocol, has also observed that the United States acceded to Article 33 based upon the view that Article 33 could be implemented through the then-existing section 243(h) of the Immigration and Nationality Act, 8 U.S.C. § 1253(h) (1976 ed.), and that section 243(h) applied *only* to deportation of refugees already in the United States. *See INS* v. *Stevic*,

[1] Your Department has also formally communicated to Congress its view that Article 33 extends only to persons who have gained entry into a territory of a contracting state. *Haitian Detention and Interdiction: Hearing Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 36-43 (1989) (statement of Alan J. Kreczko; Deputy Legal Adviser, Department of State).

467 U.S. 407, 415, 417-18 (1984). The legislative history of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, supports this view of Article 33: the House Committee Report states that the Refugee Convention was intended to "insure fair and humane treatment for refugees *within the territory of the contracting states*." H.R. Rep. No. 608, 96th Cong., 1st Sess. 17 (1979) (emphasis added).

Judge Edwards in *Haitian Refugee Center* v. *Gracey*, 809 F.2d 794 (D.C. Cir 1987), concluded unequivocally—and with specific reference to the Haitian interdiction program at issue here—that "Article 33 in and of itself provides no rights to aliens outside a host country's borders." *Id.* at 840 (Edwards, J., dissenting in part and concurring in part). The other two judges on the *Gracey* panel decided that the plaintiff lacked standing to challenge the interdiction program and decided the case on that ground, a decision from which Judge Edwards dissented. Neither of the judges in the majority, however, expressed any disagreement with or reservations about Judge Edwards' analysis of the underlying merits issues, including his discussion of Article 33 and his conclusion that it provides no rights to aliens outside a state's borders.

We note, moreover, as an independent ground for our conclusion, that the Protocol by which the United States adhered to the Convention is not self-executing for domestic law purposes. Accordingly, the Protocol itself does not create rights or duties that can be enforced by a court.

Under the Supremacy Clause of the Constitution, treaties made pursuant to the Constitution's procedures are part of the "supreme Law of the Land . . . ." U.S. Const., art. VI, cl. 2. Some treaties, however, merely impose obligations under international law that the United States, as a contracting party, must perform particular acts, without themselves creating any obligations under domestic law. In such cases the international obligation

must be "executed" through domestic legislation before the obligation becomes effectively the law of the land. Thus, in *Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829), Chief Justice Marshall recognized that not all treaties are self-executing:

> [A treaty] is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.

See also Memorandum for Michael J. Matheson, Deputy Legal Adviser, from Ralph W. Tarr, Acting Assistant Attorney General, Office of Legal Counsel, March 19, 1985 (Tarr Memorandum), at 4-5.

Whether a treaty is self-executing is controlled by the intent of the United States as a contracting party. *See British Caledonian Airways* v. *Bond*, 665 P.2d 1153, 1160 (D.C. Cir. 1981); *United States* v. *Postal*, 589 F.2d 862, 876 (5th Cir.), *cert. denied*, 444 U.S. 832 (1979); *Diggs* v *Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976). "The parties' intent may be apparent from the language of the treaty, or, if the language is ambiguous, it may be divined from the circumstances surrounding the treaty's promulgation." *Postal*, 589 F.2d at 876.

The language of the Protocol by which the United States adhered to the Refugee Convention demonstrates that the United States did not intend that the Convention, as adhered to, would be self-executing. In particular, Article III of the Protocol provides that the signatories are to communicate to the United Nations the "laws and regulations which they may adopt to ensure the application of the present Protocol." 19 U.S.T. at 6226. *Cf.* Postal, 589 F.2d at 876-77 (treaties that "expressly provide for legislative execution" are "uniformly declared executory" and therefore require further legislative action to bring the treaty into effect). Moreover, such a provision would have been unnecessary if the Refugee Convention were self-executing. *Cf.* Protocol, art. VI(b), 19 U.S.T. 6227 (any signatory with federal form of government obligated to bring the articles of Refugee Convention to the notice of the constituent states if those articles comes within the states' exclusive legislative jurisdictions). Thus, the Protocol by its own terms plainly contemplates the need for implementing legislation by its signatories.

Furthermore, the understanding of the President and the Senate in adopting the Protocol was that the United States' obligations under the Refugee Convention, pursuant to the Protocol, would not be self-executing. Specifically, the President and Senate clearly believed that pre-existing domestic law governing refugees—which applied only to persons already in the United States—would suffice to implement the Refugee Convention and the Protocol.[2] *See also Stevic*, 467 U.S. at 417-18. We also note that the Second Circuit, the only circuit court to address the question directly, has concluded that the Protocol is not self-executing. *Bertrand* v. *Sava*, 684 F.2d 204, 218-19 (2d Cir. 1982).

Because the Protocol is not self-executing, its provisions cannot be enforced by a private right of action in a

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[2] *See, e.g.*, S. Exec. K, 90th Cong., 2d Sess. III (1968) (message from Pres. Johnson) ("most refugees in this country already enjoy the protection and rights which the Protocol seeks to secure for refugees in all countries"); *id.* at VIII (report of Secretary of State Rusk) ("[Article 33] is comparable to Section 243(h) of the Immigration and Nationality Act . . . and it can be *implemented* within the administrative discretion provided by existing regulations") (emphasis added); S. Exec. Rep. No. 14, 90th Cong., 2d Sess. 4 (1966) (testimony of State Dept. official) ("refugees in the United States have long enjoyed the protection and the rights which the protocol calls for").

United States court.[3] It is well-established that individuals may directly seek enforcement of a treaty's provisions only when "the treaty . . . expressly or impliedly provides a private right of action." *Tel-Oren* v. *Libyan Arab Republic*, 736 F.2d 774, 808 (D.C. Cir. 1984) (Bork, J., concurring), *cert. denied*, 470 U.S. 1003 (1985). *See also Head Money Cases*, 112 U.S. 580, 598-99 (1884); *Frolova* v. *Union of Soviet Socialist Republics*, 761 F.2d 370, 373 (7th Cir. 1985) ("if not implemented by appropriate legislation [treaties] do not provide the basis for a private lawsuit unless they are intended to be self-executing"); *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287, 1298 (3d Cir. 1979); *Linder* v. *Calero Portocarrero*, 747 F. Supp. 1452, 1462-63 (S.D. Fla. 1990); *Haitian Refugee Cent.* v. *Gracey*, 600 F. Supp. 1396, 1405-06 (D.D.C. 1985), *aff'd on other grounds*, 809 F.2d 794 (D.C. Cir. 1987).

A one-page opinion of this Office, and one sentence in another Office of Legal Counsel opinion, might be read to suggest that refugees interdicted on the high seas enjoy certain rights under the Protocol adopting the Refugee Convention. *See* Memorandum for the Attorney General from Assistant Attorney General Olson, 5 Op. Off. Legal Counsel 242, 248 (1981) ("Individuals who claim that they will be persecuted . . . must be given an opportunity to substantiate their claims [under Article 33]."); Memorandum for the Associate Attorney General from Larry L. Sims, Deputy Assistant Attorney General (Aug. 5, 1981) ("Those who claim to be refugees must be given a chance to substantiate their claims [under Article 33]."). Among other things, those memoranda did not

[3] Of course, even were the Protocol deemed to be self-executing, the Protocol would need to be examined to see if it conferred any legally enforceable rights upon individuals interdicted outside the territory of the United States. *See also* Tarr Memorandum at 4 n.5. We have already concluded above that the Protocol does not confer any legally enforceable rights upon such individuals.

address whether the Protocol adopting the Refugee Convention is self-executing. To the extent that those memoranda could be read to suggest that Article 33, as adopted by the Protocol, imposes a judicially enforceable obligation on the United States with respect to individuals interdicted beyond its territorial boundaries, those memoranda are incorrect.

Please let us know whether we can be of further assistance.

/s/ Timothy E. Flanigan
TIMOTHY E. FLANIGAN
Acting Assistant
Attorney General

DEFENDANTS' EXHIBIT NO. 150

UNITED NATIONS

GENERAL
ASSEMBLY

GENERAL

A/CONF.2/SR.16
23 November 1951

ENGLISH
ORIGINAL: ENGLISH AND FRENCH

Dual distribution

CONFERENCE OF PLENIPOTENTIARIES ON THE STATUS OF REFUGEES AND STATELESS PERSONS

SUMMARY RECORD OF THE SIXTEENTH MEETING

held at the Palais des Nations, Geneva,
on Wednesday, 11 July 1951, at 3 p.m.

[page 6]

* * * * *

Mr. ZUTTER (Switzerland) said that the Swiss Federal Government saw no reason why article 28 should not be adopted as it stood; for the article was a necessary one. He thought, however, that its wording left room for various interpretations, particularly as to the meaning to be attached to the words "expel" and "return". In the Swiss Government's view, the term "expulsion" applied to a refugee who had already been admitted to the territory of a country. The term "*refoulement*", on the other hand, had a vaguer meaning; it could not, however, be applied to a refugee who had not yet entered the territory of a country. The word "return", used in the English text, gave that idea exactly. Yet article 28 implied the

existence of two categories of refugee: refugees who were liable to be expelled, and those who were liable to be returned. In any case, the States represented at the Conference should take a definite position with regard to the meaning to be attached to the word "return". The Swiss Government considered that in the present instance the word applied solely to refugees who had already entered a country, but were not yet resident there. According to that interpretation, States were not compelled to allow large groups of persons *claiming* refugee status to cross its frontiers. He would be glad to know whether the States represented at the Conference accepted his interpretations of the two terms in question. If they did, Switzerland would be willing to accept article 28, which was one of the articles in respect of which States could not, under article 36 of the draft Convention, enter a reservation.

Mr. ROCHEFORT (France) agreed with the views expressed by the representative of Switzerland. It was only the idea of what was generally meant by "expulsion" that should be retained.

Referring to the amendment submitted jointly by the delegations of France and the United Kingdom (A/CONF.2/69), he observed that the text of the draft Convention admitted the principle that a State could refuse the right of asylum. It was therefore only just that countries which granted that right should be able to withdraw it in certain circumstances. If they could not do so, they would think twice before granting an unconditional right.

* * * * *

[page 11]

Baron van BOETZELAER (Netherlands) supported the Swiss representative's observations. He appreciated the importance of the basic principles underlying article 28 but, as a country bordering on others, the Netherlands was somewhat diffident about assuming unconditional

obligations so far as mass influxes of refugees were concerned, unless international collaboration was sufficiently organized to deal with such a situation. He recalled that the Swiss representative had already referred to the matter of international collaboration in the general discussion at the third meeting.

Mr. THEODOLI (Italy) associated himself with the statements of the Swiss and Netherlands representatives.

He would like some clarification of the words "expel or return". Under article 28, no Contracting State was to expel or return a refugee to a territory where his life or freedom would be in danger. On the other hand, he personally felt that a State could not commit itself not to expel or return large groups of refugees who presented themselves on its territory, and who might endanger public security. The Italian delegation would therefore reserve its position on the article, unless some satisfactory explanation was forthcoming.

Mr. PETREN (Sweden) also agreed with the Swiss, Netherlands and Italian representatives. Although some representatives had spoken in support of the Second additional phrase in the first paragraph of his amendment, the general sense of the Conference appeared to be against it. He would therefore withdraw it, stressing, however, that, as the President had also urged, the text of the article should be interpreted as covering at least some of the situations envisaged in that part of the amendment. [page 12]

Mr. von TRÜTZSCHLER (Federal Republic of Germany) supported the observation of the Netherlands representative concerning countries subject to a large influx of refugees.

Mr. HERMENT (Belgium) drew attention to the fact that in article 28 the prohibition on returning refugees to the frontier could be construed as applying to individuals, but not to large groups. Such was the interpretation placed on it by the Belgian Government.

Mr. ROCHEFORT (France) pointed out that the joint amendment referred to the country in which the refugee was residing. The hypothesis of any large influx of refugees did not therefore enter into question.

The PRESIDENT asked the authors of the joint amendment to explain why they had included the words "in which he is residing". He recalled that article 28 was to apply to refugees who had entered the country of asylum both unlawfully (article 26) and lawfully (article 27).

It appeared from the text of joint amendment that only the country in which the refugee resided would be empowered to expel him if necessary, and that countries through which he passed on his way to refuge would be debarred from doing so. He wondered whether the phrase "in which he is residing" was meant to be interpreted in its broadest sense, namely, "in which he finds himself".

Mr. HOARE (United Kingdom) replied that the President's interpretation was correct so far as the English text was concerned. It might very occasionally be necessary to return the refugee almost immediately to his country of origin. Generally, however, the amendment would affect people who had been resident in the country for a considerable time, and it was for that reason that the word "residing" had been used.

* * * * *

DEFENDANTS' EXHIBIT NO. 151

UNITED NATIONS

GENERAL
ASSEMBLY

GENERAL

A/CONF.2/SR.35
3 December 1951

ENGLISH
ORIGINAL: ENGLISH AND FRENCH

Dual Distribution

CONFERENCE OF PLENIPOTENTIARIES ON THE STATUS OF REFUGEES AND STATELESS PERSONS

SUMMARY RECORD OF THE THIRTY-FIFTH MEETING

held at the Palais des Nations, Geneva,
on Wednesday, 25 July 1951, at 2:30 p.m.

* * * * *

Mr. ROCHEFORT (France) saw no objection to the insertion of those words, but requested that the summary record of the meeting should state that article 33 was without prejudice to the right of extradition.

Baron van BOETZELAER (Netherlands) recalled that at the first reading the Swiss representative had expressed the opinion that the word "expulsion" related to a refugee already admitted into a country, whereas the word "return" (*refoulement*") related to a refugee already within the territory but not yet resident there. According to that interpretation, article 28 would not have involved any obligations in the possible case of mass migration across frontiers—or of attempted mass migrations.

He wished to revert to that point, because the Netherlands Government attached very great importance to the scope of the provision now contained in article 33. The Netherlands could not accept any legal obligations in respect of large groups of refugees seeking access to its territory.

At the first reading the representatives of Belgium, the Federal Republic of Germany, Italy, the Netherlands and Sweden had supported the Swiss interpretation. From conversations he had since had with other representatives, he had gathered that the general consensus of opinion was in favour of the Swiss interpretation.

In order to dispel any possible ambiguity and to reassure his Government, he wished to have it placed on record that the Conference was in agreement with the interpretation that the possibility of mass migrations across frontiers or of attempted mass migrations was not covered by article 33.

There being no objection, the PRESIDENT *ruled* that the interpretation given by the Netherlands repersentative should be placed on record.

Mr. HOARE (United Kingdom) remarked that the Style Committee had considered that the word "return" was the nearest equivalent in English to the French term "*refoulement*". He assumed that the word "return" as used in the English text had no wider meaning.

The PRESIDENT suggested that in accordance with the practice followed in previous Conventions, the French word "*refoulement*" ("*refouler*" in verbal uses) should be included in brackets and between inverted commas after the English word "return" wherever the latter occurred in the text.

He further suggested that the French text of paragraph 1 should refer to refugees in the singular.

The Swedish suggestion that the words "membership of a particular social group" be inserted in paragraph 1 after the word "nationality" was adopted unanimously.

The two suggestions made by the President were adopted unanimously.

Mr. CHANCE (Canada) pointed out that the word "particular" in the last line of paragraph 2 should read "particularly".

Mr. HOARE (United Kingdom) said that the word "trial" in paragraph 2 should read "final".

It was so agreed.

Mr. HOARE (United Kingdom) observed that paragraph 2 spoke of refugees "convicted by a final judgment of a particularly serious crime." In the original version that clause had been limited to the country of residence. The existing text was the result of a Swedish amendment. He suggested that it might be more consistent to revert to the original wording, and say "convicted by a final judgment in that country", since under what was now paragraph F of article 1 a person who had committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee was excluded from the categories of refugees; he should therefore be considered as also being outside the scope of article 33.

Mr. PETREN (Sweden) explained that his amendment had been intended to cover cases such as, for example, that of a Polish refugee who had been allowed to enter Sweden and who, in passing through Denmark, had committed a crime in that country.

DEFENDANTS' EXHIBIT NO. 152

DECLARATION OF REAR ADMIRAL WILLIAM P. LEAHY, JR.

I, Rear Admiral William P. Leahy, Jr., United States Coast Guard, submit the following declaration setting forth the United States Coast Guard's role in current operations off the coast of Haiti:

1. I am the Chief of the Office of Law Enforcement and Defense Operations for the United States Coast Guard. I have served in that capacity since June, 1991.

2. As the Chief, Office of Law Enforcement and Defense Operations, I am responsible for program oversight of Coast Guard surface and aviation operations, including current operations off the Haitian coast. I have personal knowledge of the facts stated below from information I have obtained from other Coast Guard personnel in the course of my duties.

3. The Coast Guard's involvement in Alien Migration Interdiction Operations began in 1981. In the first ten years of this program, the Coast Guard interdicted approximately 25,000 Haitian migrants. Originally, Haitian migrants were interdicted at sea and interviewed on board Coast Guard cutters by embarked Immigration and Naturalization Service personnel. Generally, those persons identified as economic migrants were immediately repatriated to Haiti, while those identified as raising plausible claims for political asylum were transported to the United States.

4. Since October, 1991, the Coast Guard has interdicted over 34,000 Haitian migrants. In November, 1991, in order to ease severe overcrowding on board Coast Guard cutters and reduce significant health and safety risks, the Coast Guard was permitted to begin off-loading interdicted migrants, including those who had not yet been interviewed by the Immigration and Naturalization

Service, at Naval Base Guantanamo. Ultimately, the Department of Defense established temporary facilities at Guantanamo with a capacity of 12,500 persons. This allowed the Coast Guard cutters, which had been forced to seek relief and shelter inport due to the overcrowding, to resume interdictions.

5. In May, 1992, the interdiction rates again swelled. From May 1 through May 20, 1992, 127 vessels carrying 10,497 Haitian migrants were interdicted by the Coast Guard. On May 19 alone, the Coast Guard interdicted 1,511 Haitian migrants. Attached to this declaration is a copy of the Coast Guard's May 29, 1992 statistical interdictions summary. This summary is cumulative from October 28, 1991.

6. At the same time, the temporary facilities at Guantanamo neared capacity. To preclude an emerging situation in which Coast Guard cutters might have become dangerously overloaded, on May 20, 1992, Real Admiral Kramek, Commander, Seventh Coast Guard District, the operational comander of units involved in alien interdictions, directed cutters on patrol to remove Haitian migrants from their vessels only when it appeared that a vessel was in imminent danger of foundering with resulting injury or loss of life.

7. From May 20 through May 23, 1992, Coast Guard units observed fifteen migrant vessels, but did not interdict those vessels. Although these vessels were evaluated as not in immediate danger, they were, by normal United States boating standards, unseaworthy, overloaded, and unfit for their intended voyage. For example, I received a report that a Haitian vessel departing Cuba overturned on May 17, 1992, resulting in the deaths of approximately half of the forty Haitian migrants onboard.

8. As may be seen in the attached statistical summary, the numbers of migrants interdicted by the Coast Guard has risen during the month of May. Based on this apparent trend, the lack of information suggesting that

the numbers of persons departing Haiti by sea would lessen at any time in the near future, and the impending lack of capacity at Naval Base Guantanamo, it was my professional opinion that Coast Guard resources available at the time of the May 20, 1992 policy change were insufficient to deal with this continuing crisis.

9. This posed a significant risk of loss of life. If available Coast Guard cutters had become so overloaded with migrants that they could not safely continue to interdict additional migrants, the Coast Guard would have been unable to respond even to vessels in immediate distress. This risk would have increased as the numbers of migrant departing Haiti in unseaworthy, ill-equipped boats increased.

10. On May 22, 1992, Commander, U.S. Atlantic Command, Norfolk, Virginia, issued a directive that Naval Base Guantanamo would not accept additional migrants because the temporary camps did not have the space, sanitation capacity, security resources, or housing and feeding capacity to safely accommodate more than 12,500 people.

11. On May 23, 1992, President Bush issued an Executive Order directing the Secretary of the Department in which the Coast Guard is operating to issue appropriate instructions to the Coast Guard to stop and board vessels believed to be violating United States immigration laws, or violating laws of a foreign country with which we have an arrangement, and return those vessels and passengers to the country from which they came. On May 24, 1992, after receiving appropriate instructions from the Secretary of Transportation, the Coast Guard issued guidance to the units involved concerning the implementation of the new Executive Order.

12. Under this guidance, which went into effect immediately, interdicted Haitians are being repatriated directly to Haiti. They are not being interviewed by the Immigration and Naturalization Service prior to repa-

triation. The only exceptions are if a commanding officer believes that repatriation would place an individual in immediate and exceptionally grave physical danger, based either on the commanding officer's observation of dangerous conditions at the time of repatriation or compelling statements from the individual. Commanding officers are directed to provide temporary refuge and immediately seek direction from higher authority if such a situation arises.

13. As indicated in the attached statistical summary, in the first five days after the new policy went into effect, the Coast Guard has interdicted 1,271 migrants. Of these, 339 had been repatriated as of May 29, 1992. An additional 704 migrants remain on Coast Guard cutters, awaiting repatriation.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 29, 1992 in Washington, D.C.

/s/ William D. Leahy, Jr.
WILLIAM D. LEAHY, JR.
Rear Admiral, United States
Coast Guard
Chief, Office of Law
Enforcement and Defense
Operations

COAST GUARD HAITIAN MIGRATION INTERDICTION/REPATRIATION OPERATIONS DATE: 291000Z MAY 92
Page 1

CUTTER	LOCATION	O/B CGCs	PRU/SAT
THETIS (OTC)	ENR PAP	378	250/350
FORWARD	ENR GTMO	0	250/350
ESCANABA	OUTCHOP	0	250/350
CONFIDENCE	ENR PAP	185	250/350
COURAGEOUS	W/W	227	150/230
ALERT	ENR PAP	173	150/230
DECISIVE	W/W	0	150/230
MAUI	GTMO	0	080/120
PADRE	SAR	0	080/120
PEA ISLAND	W/W	0	080/120

TOTAL HAITIANS OFFLOADED GTMO
0

TOTAL HAITIANS O/B CUTTERS
963

HAITIAN OPS SUMMARY

HAITIANS INTERDICTED TOTAL	HAITIANS INTERDICTED DAILY
35367	282

VESSELS INTERDICTED TOTAL	VESSELS INTERDICTED DAILY
476	2

HAITIANS REPATRIATED TOTAL	HAITIANS REPATRIATED DAILY
16640	504

HAITIAN DISPOSITION SUMMARY

Onboard Cutters	963
GTMO:	
Unscreened	6625
Screened Out	2014
Screened In	2929
Other	0
Total GTMO -	11568
Repat to PAP-by USCG	16640
Political in US	7069
Other Countries	123
Rtnd PAP-via Oth Coun (as rptd by INS 15May)	287
Disposition Complete	24119

COAST GUARD HAITIAN INTERDICTION/REPATRIATION OPERATIONS DATE: 291000Z MAY 92

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OCT/NOV	INTERDICTS VSLS	INTERDICTS HAIT	DEC	INTRDICTS VSLS	INTRDICTS HAIT	HAIT O/B CGCs	JAN	INTRDICTS VSLS	INTRDICTS HAIT	HAIT O/B CGCs	FEB	INTRDICTS VSLS	INTRDICTS HAIT	HAIT RPAT	HAIT O/B CGCs
28-31	1	19	1	4	340	2248	1	0	0	176	1	1	24	0	1946
1-2	0	0	2	0	0	1092	2	0	0	0	2	0	0	0	1483
3	0	0	3	0	0	458	3	0	0	0	3	1	24	381	1023
4	1	47	4	1	50	156	4	0	0	0	4	0	0	0	1599
5	3	82	5	0	0	156	5	0	0	0	5	4	297	0	1599
6	1	36	6	5	199	355	6	0	0	0	6	0	0	508	853
7	0	0	7	0	0	179	7	0	0	0	7	0	0	0	206
8	4	85	8	0	0	179	8	0	0	0	8	0	0	200	357
9	1	175	9	1	32	32	9	0	0	0	9	1	13	0	1
10	3	46	10	5	232	105	10	1	189	0	10	1	31	510	523
11	0	0	11	3	218	264	11	0	0	189	11	0	0	0	44
12	1	32	12	1	184	666	12	0	0	189	12	0	0	507	513
13	2	164	13	2	22	666	13	1	15	15	13	1	79	251	257
14	2	353	14	2	129	22	14	0	0	15	14	2	92	508	587
15	2	164	15	1	139	139	15	1	12	0	15	0	0	0	171
16	7	372	16	3	156	274	16	1	43	41	16	1	34	0	598
17	2	173	17	0	0	430	17	0	0	41	17	2	125	527	196
18	6	444	18	0	0	430	18	0	0	0	18	0	0	0	713
19	7	628	19	0	0	452	19	3	247	247	19	1	77	516	655
20	1	26	20	0	0	0	20	5	219	381	20	0	0	510	510
21	1	47	21	0	0	0	21	2	79	219	21	0	0	510	0
22	4	439	22	0	0	0	22	5	281	298	22	0	0	0	0
23	7	383	23	0	0	0	23	16	1072	281	23	0	0	0	517
24	7	810	24	0	0	0	24	9	680	1093	24	0	0	517	0
25	6	433	25	1	87	87	25	0	0	1568	25	0	0	0	510
26	3	158	26	0	0	87	26	3	293	1023	26	1	72	510	583
27	2	78	27	2	366	453	27	30	1305	1745	27	1	355	511	938
28	8	592	28	1	14	467	28	20	1178	2478	28	0	0	511	. 0
29	2	23	29	0	0	379	29	3	286	2327	29	0	0	0	0
30	3	223	30	2	177	226	30	2	167	1986					
			31	0	0	318	31	4	587	1767	PRIOR 01 FEB			1132	
1-15	21	1203	1-15	25	1545		1-15	7	716		1-15	11	560	2865	
16-30	66	4829	16-31	9	800		16-31	103	6437		16-29	6	663	4112	
TOTAL	87	6032	TOTAL	34	2345		TOTAL	106	6653		TOTAL	17	1223	6977	

COAST GUARD HAITIAN INTERDICTION/REPATRIATION OPERATIONS DATE: 291000Z MAY 92

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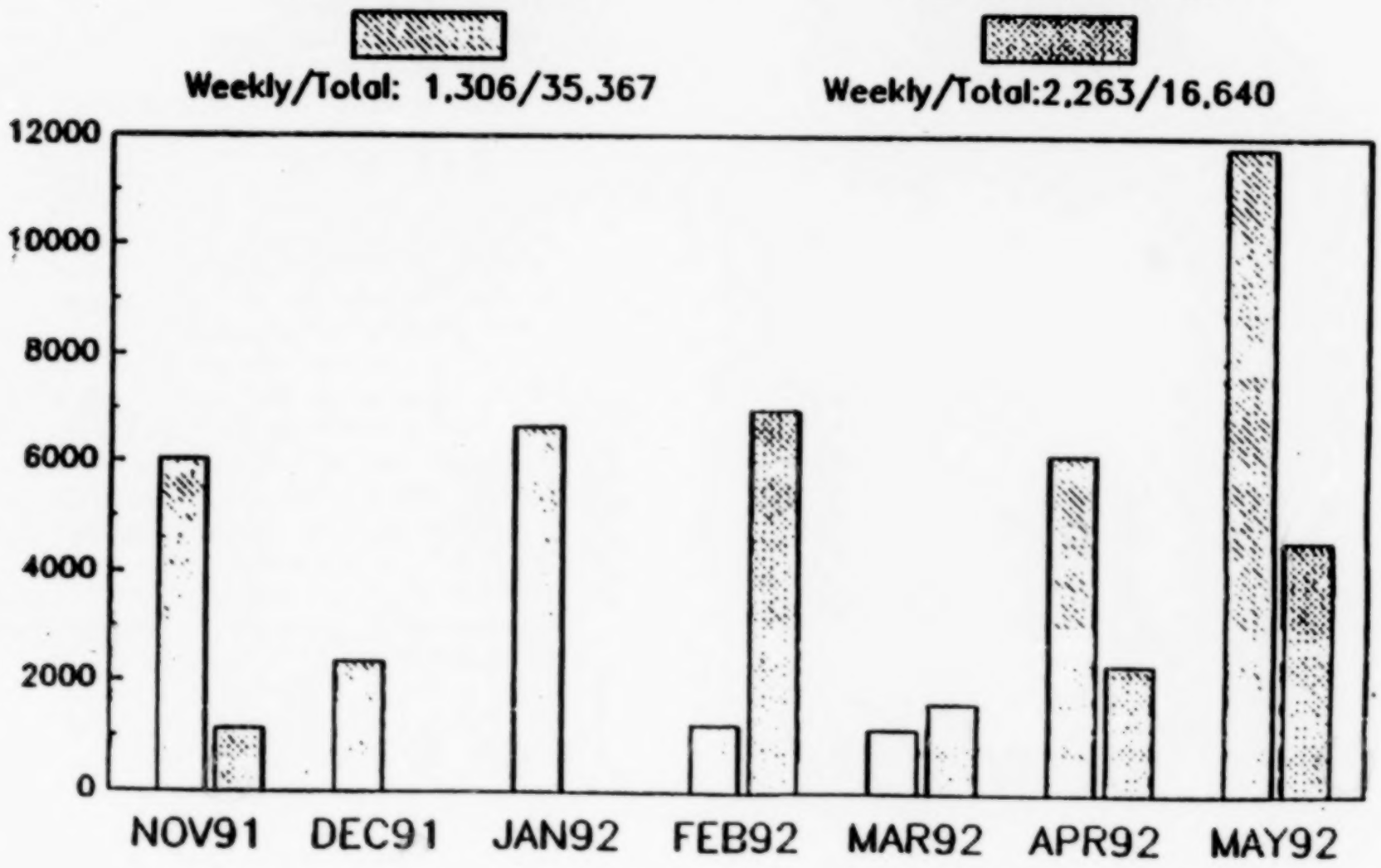
MAR	INTERDICTS VSLS	HAIT	RPAT	HAIT O/B CGCs	APR	INTERDICTS VSLS	HAIT	RPAT	HAIT O/B CGCs	MAY	INTERDICTS VSLS	HAIT	RPAT	HAIT O/B CGCs
1	0	0	0	0	1	3	135	0	861	1	0	0	0	228
2	0	0	0	0	2	2	242	0	1103	2	0	0	220	8
3	0	0	0	0	3	2	84	0	1182	3	1	247	0	494
4	0	0	0	0	4	1	28	197	335	4	9	682	247	929
5	0	0	0	0	5	1	18	0	242	5	7	593	0	1040
6	0	0	0	0	6	1	177	224	195	6	8	667	0	1273
7	0	0	0	0	7	3	350	0	596	7	7	181	244	637
8	0	0	0	512	8	2	62	245	253	8	3	178	102	178
9	1	55	512	55	9	3	206	0	412	9	4	272	0	272
10	1	134	0	659	10	2	273	206	505	10	6	245	0	486
11	0	0	525	0	11	2	134	0	134	11	10	755	251	428
12	1	22	0	22	12	2	34	0	168	12	4	521	0	767
13	0	0	299	22	13	8	568	0	994	13	12	999	246	1043
14	0	0	0	0	14	1	142	260	112	14	6	328	0	659
15	0	0	0	0	15	2	98	0	348	15	9	878	125	896
16	0	0	0	97	16	5	461	251	560	16	8	921	0	801
17	0	0	97	0	17	3	297	0	437	17	7	604	0	658
18	0	0	0	0	18	3	435	0	567	18	8	388	0	
19	0	0	0	0	19	3	184	0	452	19	14	1511	387	1853
20	0	0	0	0	20	2	248	0	775	20	4	527	252	1176
21	0	0	0	0	21	3	510	501	784	21	0	0	259	429
22	0	0	0	0	22	3	227	0	511	22	1	35	429	477
23	0	0	0	0	23	1	71	0	216	23	0	0	258	570
24	0	0	0	0	24	2	99	128	340	24	0	0	0	510
25	1	141	0	141	25	4	123	153	268	25	3	38	510	38
26	1	61	0	202	26	1	91	0	91	26	2	339	38	844
27	0	0	0	190	27	6	293	0	331	27	7	612	524	1129
28	1	28	126	71	28	7	553	55	756	28	2	282	504	963
29	2	231	0	302	29	0	0	96	192	29				
30	1	99	60	340	30	1	10	0	8	30				
31	2	387	0	727						31				
1-15	3	211	1336		1-15	35	2561	1132		1-15	86	6546	1439	
16-31	8	947	283		16-30	44	3602	1184		16-30	56	5257	3161	
TOTAL	11	1158	1619		TOTAL	79	6153	2316		TOTAL	142	11803	4596	
										CUM TOTAL	476	35367	16640	

HAITIAN INTERDICTION OPERATIONS

As of 29 1000Z May 92



DEFENDANTS' EXHIBIT NO. 153

DECLARATION OF REAR ADMIRAL LLOYD E. ALLEN, JR.

I, Rear Admiral Lloyd E. Allen, Jr., United States Navy, being sworn, depose and state the following.

1. I am Deputy Director for Operations (Current Operations) for the Joint Staff of the Joint Chiefs of Staff. In that capacity, I have personal knowledge obtained from other Department of Defense personnel in the course of my duties regarding the camps at Guantanamo Bay, Cuba that have been set up to house temporarily Haitian migrants interdicted and rescued by the United States Coast Guard.

2. There are two camps housing Haitian migrants at the United States Naval Base at Guantanamo Bay, Cuba—Camp McCalla with 4 tent encampments and Camp Bulkeley with one. Our evaluation of current conditions is that both camps combined have a total capacity of 12,500 people. This total includes placing 1,000 people within the confines of an aircraft hangar, a facility suitable for shelter for only a very short time. Additionally, use as a shelter removes this facility from its current use as a processing center for incoming/outgoing Haitians. As of 28 May, there were 11,568 Haitian migrants resident at Guantanamo with an additional number of migrants presently embarked aboard Coast Guard cutters. If additional migrants leaving Haiti were taken to Guantanamo Bay, the capacity of Guantanamo Bay Naval Station will be reached within the next 48 hours.

3. Guantanamo lacks the infrastructure necessary to support additional migrants beyond the 12,500. Beyond the lack of shelter, the base is unable to dispose of the waste associated with a population in excess of the limit established by the Joint Task Force Commander and

USCINCLANT. Water supplies to the camps are carried in pipes above ground which, because of Guantanamo's tropical location, results in high ambient water temperature. As the temperatures continue to rise, the demands for water will increase, while the sanitation and general living conditions will become intolerable. Finally, current camp levels already fully tax the Guantanamo electrical system. All available flat land is in use. The ony sites available for immediate expansion are Morale Welfare and Recreation areas (ball fields, school playground). Conversion of these sites to camp use with the attendant overload of naval base infrastructure would require imposition of water rationing and probable evacuation of military dependents from Guantanamo. The approaching summer season with its hurricanes and tropical storms is an additional cause of concern. Comprehensive hurricane shelter plans have been developed and the maximum capacity for emergency migrant hurricane shelter protection is 8,300.

4. The impacts on DoD's ability to perform its other missions within the USCINCLANT area of responsibility have been significant. In addition to extensive sealift requirements, numerous C-5, C-141, and C-130 flights have been required to supply the camps. Joint Task Force Guantanamo includes over 2,000 soldiers, sailors, airmen, and marines. Critical civil affairs and psychological operations assets from the Reserve community have been solicited and have volunteered to serve as they did in Just Cause and during DESERT SHIELD/STORM. This has proven to be a strain on them and their families, but as important, has severely depleted a low density resource within DoD. Military Police assets from installations within the United States have been deployed, depriving their home bases of needed services. This is in addition to deployment of Marine Corps personnel that responded to disruptions in one of the camps. As a result of the Haitian population and the attendant logistical

support, Naval Station Guantanamo can no longer provide support to units deployed for exercises within the region.

5. The Department of Defense has no alternative locations to augment Guantanamo within reasonable steaming distances of Haiti which could be utilized as temporary facilities for the migrants.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Lloyd E. Allyn
29 May 1992

DEFENDANTS' EXHIBIT NO. 154

DECLARATION OF ARNOLD L. KANTER

1. I, Arnold L. Kanter, am the Under Secretary of State for Political Affairs, a position I have held since October 1991. Organizationally, the Under Secretary of State for Political Affairs is the third ranking position within the Department of State, immediately following the Secretary of State and the Deputy Secretary of State. In that capacity, I participate in the formulation and execution of United States foreign policy. I advise both the Secretary and the Deputy Secretary of State concerning specific and general foreign policy issues, including matters within the Inter-American region. These responsibilities require close coordination at the highest levels with a number of other departments and agencies within the United States Government.

2. I have been actively involved in the formulation and implementation of U.S. foreign policy responses to the coup d'etat that took place in Haiti on September 30, 1991, in which the duly elected president of Haiti, Jean Bertrand Aristide, was overthrown. Since that time, I have provided ongoing policy guidance with respect to U.S. international efforts both to restore constitutional rule in Haiti and to stem the outflow of Haitian boat migrants to the United States. The following information is based upon either personal knowledge of information provided to me by Department personnel, including personnel of the Bureau for Refugee Programs and the Bureau of Inter-American Affairs, in the course of their official duties.

3. During the past several weeks, the underlying political crisis in Haiti has continued unabated, and efforts to find a constitutional and durable solution have not yet been successful. The adverse effects for U.S. foreign policy of the issuance of a restraining order by the District Court cannot be overstated.

4. The boat migrant problem severely compounds and complicates the underlying political crisis afflicting Haiti, which is the principal focus of U.S. foreign policy towards that country. A temporary restraining order would undermine the U.S. Government's flexibility in dealing with this international crisis and would make the U.S. government particularly vulnerable to pressure tactics from the de facto authorities in Haiti, who would use a massive outmigration of Haitian citizens to put the U.S. under pressure to abandon the embargo and other measures designed to speed the return of democracy. I believe that the de facto authorities in Haiti would be encouraged in this course by a restraining order arising from the current litigation.

5. Moreover, interference with repatriation of Haitian interdictees would complicate U.S. bilateral relations with neighboring countries such as the Bahamas, the Dominican Republic, Honduras, Jamaica and Venezuela. In response to the outflow of Haitian migrants, several of these countries have been providing temporary shelter to populations of Haitian boat interdictees, in part as a result of U.S. diplomatic initiatives. These countries are also anxious to repatriate the Haitian interdictees they are sheltering. However, as the number of new Haitian interdictees picked up by the U.S. Coast Guard has continued to swell and the capacity to accommodate them at Guantanamo or on Coast Guard cutters has reached its limit, the United States has been compelled yet again to launch diplomatic efforts vis-a-vis these and other countries to persuade them to accept even larger numbers of Haitians for temporary safehaven. Experience has proven that the prospects of success for such diplomatic initiatives are quite low and may negatively affect U.S. relations with states in the region. Just last week, a private U.S. request to the Dominican Republic to consider establishing a UNHCR camp on its territory became a central issue in public debate in the Dominican

Republic and a source of intense criticism of the United States, thus complicating U.S.-Dominican relations.

6. The effects of a temporary restraining order or injunction would also materially complicate U.S.-Cuban relations. This is due in part to the protracted presence of large numbers of Haitians at the U.S. facility at Guantanamo Bay, Cuba. If the number of migrants interdicted on the high seas by U.S. Coast Guard cutters remains at the levels experienced in recent weeks—which I have every reason to believe would be the case—and if the United States Government were restrained from repatriating them directly to Haiti, the facility at Guantanamo would be pressed beyond its capacity. Such a situation could at any moment offer the Castro regime an opportunity to engage in a provocative action that could place a severe strain on: (i) already tense bilateral diplomatic relations, setting back U.S. efforts to resolve important bilateral issues such as Cuban migration; (ii) the migration processing operation for Haitian interdictees at Guantanamo; and (iii) the security of our facility at Guantanamo.

7. In sum, U.S. foreign relations interests would be undermined by an order preventing the direct repatriation of Haitian interdictees. Bearing in mind the ultimate objective of U.S. foreign policy toward Haiti, i.e., to promote the establishment of a democratic, constitutional and stable government in that country as expeditiously as possible, it is my considered view that U.S. foreign relations interests cannot be subordinated to an injunction doing severe injury to the interests of the United States.

8. In light of the saturation of Guantanamo and the Coast Guard cutters, the lack of a third country option of the necessary magnitude, the continuing massive outflow, and the attendant risks of loss of life, the U.S. Government faced a difficult policy decision: whether to bring all fleeing Haitians to the U.S. for asylum proc-

essing or whether to return them directly to Haiti upon interdiction. Due to the judgment that bringing all Haitians to the U.S. would precipitate an outflow of a magnitude as yet unknown, and the even greater prospect of loss of significant numbers of lives, the decision was made to return interdictees directly to Haiti.

9. Haitians who fear persecution will have the opportunity to have their claims to refugee status heard by U.S. Embassy officers, without risk to their lives by putting to sea, due to the existence of the unique opportunity (currently implemented in only three other countries in the world) to present an in-country request for admission to the U.S. as a refugee at the U.S. Embassy in Port-au-Prince. Consistent with the President's directive, the State Department is prepared to reorganize or increase the Embassy staff to accommodate additional requests, if necessary. In addition, Embassy personnel will be travelling outside Port-au-Prince to assist applicants in other parts of the country in pursuing their claims.

10. Persons who wish to apply for refugee status in Haiti may come in person or obtain information by mail or telephone at the Consular Section of the Embassy in Port au Prince. The Embassy is making information about the application process available to the general public and to persons repatriated by the Coast Guard. The Embassy has reported that members of President Aristide's staff have already come to the Consular Section for refugee processing without evidence of surveillance by the authorities and without subsequent difficulties.

11. There are adequate refugee admissions numbers available to support the admission into the U.S. of approved Haitian refugees. There are 3000 refugee admissions numbers allocated to the Latin American and Caribbean region for fiscal year 1992, ending September 30, 1992. In addition to the regional ceiling, there is a reserve of 1000 admissions numbers which have not been allocated to any region, and which to date have not been

used. In the event that it is necessary, these numbers could be made available for Haitian refugee admissions. It is also possible that unused admissions numbers from other regions could be reallocated for Haitians, if necessary. Finally, in the unlikely event that the number of approved Haitian refugees exceeds all of these combined sources of admissions numbers, the refugee admissions statute provides the authority for the President to determine that an unforeseen emergency exists and consult with the Congress for the purpose of fixing an additional number of refugees that may be admitted in response to such emergency.

12. The Department of State has instructed the Embassy in Port-au-Prince to devote personnel and other resources to monitoring the post-repatriation treatment of returnees. This monitoring effort is two-fold: first, Embassy officials have been directed to make spot checks around the country on the well-being of randomly selected returnees; second, Embassy officials have been directed to continue to make first-hand investigations when specific allegations of mistreatment are conveyed to the INS, the Embassy, the Department of State, or other credible sources.

13. In addition to the Embassy's own monitoring efforts, the Embassy also has access to a network of contacts in Haiti that permits it to evaluate possible violations of human rights in Haiti. These contacts include key political figures at all levels and across the political spectrum, business persons, the clergy, educators, the media, health care workers, and human rights activists. The Embassy also maintains contact with the international community, including private voluntary organizations working throughout the country in such areas as agriculture, health care and education; missionary and other religious groups; and representatives of international organizations.

14. Since repatriations resumed on January 31, 1992, Embassy staff have talked to more than 2,000 returnees, or their relatives, friends and neighbors. Based on the information gathered through these personal inquiries, the Department has no reason to believe that returnees have been subjected to harm as a result of their departure from Haiti or their subsequent return.

15. In addition, the Embassy has been asked to attempt to substantiate the specific claims of a limited number of Haitian interdictees, either as part of the screening process or in response to specific allegations of harm to a returnee. In these instances, the Embassy either has not been able to verify the validity of the allegations, or, in some instances, has found directly contradictory information.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Arnold L. Kanter

Executed in Washington, D.C.
May 29, 1992

No. 91-1292

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

HAITIAN REFUGEE CENTER, ET AL., PETITIONERS

v.

JAMES BAKER, III, SECRETARY OF STATE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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STUART M. GERSON
Assistant Attorney General
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QUESTIONS PRESENTED

This case involves a challenge to an interdiction program established by the President. Under that program, Haitian aliens seeking illegal entry into the United States are interdicted on the high seas and repatriated to Haiti, unless they establish a credible claim to refugee status. The questions presented are:

1. Whether Article 33.1 of the United Nations Convention on the Status of Refugees affords the petitioner Haitian migrants any enforceable rights in United States courts with respect to the operation of the interdiction program outside the territory of the United States.

2. Whether any judicially enforceable rights are conferred on the Haitian migrants by the Executive Order establishing the interdiction program, internal operating guidelines issued by the Immigration and Naturalization Service, or Sections 208(a) and 243(h) of the Immigration and Nationality Act, 8 U.S.C. 1158(a) and 1253(h).

3. Whether the petitioner Haitian migrants have a cause of action to challenge the interdiction program under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*

4. Whether injunctive relief barring repatriation of Haitian migrants is in any event barred by equitable principles.

5. Whether petitioner Haitian Refugee Center has a right under the First Amendment to have its representatives board Coast Guard cutters on the high seas and enter the United States Naval Base at Guantanamo Bay, Cuba, to speak with and advise interdictees who are held in custody.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

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HAITIAN REFUGEE CENTER, ET AL., PETITIONERS

v.

JAMES BAKER, III, SECRETARY OF STATE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

STATEMENT

1. This case arises out of the President's exercise of his constitutional and statutory authority to establish a program for interdicting aliens on the high seas. See 8 U.S.C. 1182(f), 1185(a). That program, begun in 1981, stems from a Presidential determination that uncontrolled illegal immigration by sea is a "serious national problem." Proclamation No. 4865, 46 Fed. Reg. 48,107 (1981). Accordingly, the President, by Executive Order, directed the Coast Guard to intercept vessels suspected of transporting illegal immigrants and to return all of the passengers to their country of origin, subject to the proviso

that any "person who is a refugee" is not to be repatriated without his consent. Exec. Order No. 12,324, § 2(c)(3) (Pet. Exh. 1-2).[1] Contemporaneously, the United States entered into a bilateral agreement with Haiti, under which U.S. officials are permitted to interdict and board Haitian flag vessels suspected of carrying illegal immigrants. Agreement Effected by Exchange of Notes, Sept. 23, 1981, United States-Republic of Haiti, 19 U.S.T. 8223, T.I.A.S. No. 10,241 (Pet. Exh. 4-6).

The interdiction program has been a very effective tool in the enforcement of our immigration laws. It has also saved countless lives. Most vessels interdicted have been "grossly overloaded, unseaworthy, lacking basic safety equipment, and operated by inexperienced sailors." 11/20/91 Decl. of Rear Admiral Leahy ¶ 4 (Gov't Stay App. B, Exh. 3). Many of these vessels could not have completed the 500-mile voyage to the United States. Between 1981 and 1991, more than 25,000 would-be migrants were interdicted. *Ibid.* A State Department study of migration patterns from Haiti over that period "indicates that increased outflows tend to coincide with periods of economic difficulty rather than any particular political factor." 12-1-91 Decl. of Robert S. Gelbard ¶ 3 (Gov't Stay App. C, Exh. 10). Thus, although the present crisis began with a military coup in Haiti on September 30, 1991, the virtual exodus of illegal immigrants from Haiti began approximately one month later, when economic sanctions were imposed. 11/20/91 Leahy Decl. ¶ 5; Gelbard Decl. ¶ 3. More than 15,000 Haitian migrants have been interdicted by the Coast Guard since October 28, 1991.

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[1] As used herein, "Pet. Exh." refers to the exhibits included in the bound certiorari petition; "Pet. App." refers to the six volumes of appendices filed by petitioners; and "Gov't Stay App." refers to the appendices to the Application for a Stay Pending Appeal we filed in this Court on January 30, 1992.

Under Section 3 of the Executive Order, the Attorney General is responsible for determining whether any of the aliens taken into Coast Guard custody are "refugees" —persons who have a well-founded fear of persecution on account of their political opinion (see 8 U.S.C. 1101 (a)(42)(A); *INS v. Elias-Zacarias*, No. 90-1342 (Jan. 22, 1992), slip op. 4)—who should not be repatriated. To implement this directive, the Immigration and Naturalization Service (INS) developed screening procedures, which are set forth in internal "guidelines" (Pet. Exh. 7-9) and further described in declarations filed below. 11/20/91 Decl. of Leon Jennings (Gov't Stay App. B, Exh. 5); 12/10/91 Decl. of Gregg A Beyer ¶¶ 3-4, 8-15 (Gov't Stay App. G).

Under the procedures, an INS official first interviews the interdicted aliens on board the Coast Guard cutter to identify any aliens who make a credible showing of refugee status. The INS guidelines create an informal, non-adversarial process to permit expeditious identification of potential refugees so that the Coast Guard can immediately return other interdicted aliens to their country of origin. Under current practice, any aliens who satisfy the threshold standard are to be brought to the United States so that they can file an application for asylum under Section 208(a) of the Immigration and Nationality Act (INA), 8 U.S.C. 1158(a). These "screened in" individuals then have the opportunity for a full adjudicatory determination of whether they satisfy the statutory standard of being a "refugee" and otheriwse qualify for the discretionary relief of asylum. Any aliens who are initially "screened in" but ultimately not granted asylum are then to be returned to their country of origin, consistent with procedures afforded under the INA.

2. On November 19, 1991, immediately following the resumption of repatriations (which the Executive Branch had temporarily suspended in the wake of the coup in Haiti), petitioner Haitian Refugee Center (HRC) filed

this action for injunctive relief against officials of the Department of State, the Coast Guard, and INS. Although the D.C. Circuit had previously held that HRC (a private, non-profit corporation in the United States) did not have standing to bring many of the same claims affecting Haitians interdicted on the high seas,[2] the district court, within a few hours, granted HRC's application for a temporary restraining order (TRO) barring repatriations. Because the United States was unable to appeal the TRO, it was compelled fundamentally to alter the interdiction program. Although the Coast Guard continued to interdict the Haitian migrants, they could not be returned to Haiti or kept indefinitely on the decks of Coast Guard cutters; the interdictees therefore were transported to the U.S. Naval Base at Guantanamo Bay, Cuba, where they could be temporarily housed in shelters under the custody of the Department of Defense and INS. In the interests of continuity and uniformity, however, INS continued to conduct the initial screening interviews at Guantanamo pursuant to the informal, non-adversarial procedures utilized aboard Coast Guard cutters. While the TRO was in effect, the district court also ordered discovery that permitted representatives of HRC to have access to individual Haitians at Guantanamo. Pet. App. 41, 63. HRC then filed an amended complaint, in which it named some individual Haitians, to whom it obtained access only through discovery as plaintiffs and as representatives of a class. Pet. App. 62; Gov't Stay App. F.

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[2] *HRC* v. *Gracey*, 809 F.2d 794 (D.C. Cir. 1987). In a separate opinion, Judge Edwards rejected HRC's claims on the merits, concluding that the interdiction program violated no rights of the Haitians under the INA, the Constitution, or Article 33 of the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150. 809 F.2d at 837-841. The United States acceded in 1968 to the U.N. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, which bound parties to adhere to Articles 2-34 of the Convention.

3. On December 3, 1991, the district court entered a preliminary injunction against repatriation based on two of petitioners' numerous claims—those arising under Article 33 of the U.N. Convention and the First Amendment. Pet. App. 42.[3] The government took an immediate appeal, and on December 17, 1991, the court of appeals dissolved the preliminary injunction. Pet. App. 43. The court instructed the district court to dismiss the claims under Article 33, holding that it is not self-executing and thus provides no enforceable rights to the Haitian plaintiffs. *Id.* at 3. It also held that HRC's claim of a First Amendment right of access to the interdictees could not support the district court's order barring repatriation of the interdictees, since that relief did not redress any right asserted by HRC. Id. at 3-4.[4] Judge Hatchett dissented.

4. On the evening of the day the court of appeals ruled, the district court granted another "temporary" order against repatriation of the Haitian interdictees, this time based on the same APA claims that it had rejected just fifteen days earlier. Pet. App. 44. On December 19, 1991, the court of appeals, again over Judge Hatchett's dissent, granted the government's motion for an emergency stay of that order. Pet. App. 45. On the following day, however, the district court entered yet another injunction against repatriation, this time based on HRC's asserted constitutional right of "access" to Guantanamo to confer with interdictees. Pet. App. 46. Despite the government's immediate appeal of that order and request for an immediate stay, the court of appeals allowed the injunction to stand pending expedited briefing

[3] The district court found, however, that petitioners had not shown a probability of success on their remaining claims under the Fifth Amendment, INA, Executive Order, INS guidelines, and Administrative Procedure Act (APA). Pet. App. 42, at 52-55.

[4] Petitioners' suggestion of rehearing *en banc* with respect to the Article 33 ruling was rejected on January 28, 1992, with no judge having requested a formal poll of the court. Pet. App. 51.

and argument. In late January, when the tide of Haitian emigration increased significantly and threatened disruption of the Nation's foreign policy interests and military operations on the high seas and at Guantanamo, the government renewed its motion for a stay. After the court of appeals failed to respond, the government sought a stay of the injunction from this Court. The Court granted a stay on January 31, 1992, and the court of appeals granted a stay as well. Pet. Stay Applic. 19-21.

5. On February 4, 1992, the court of appeals rendered a thorough decision rejecting all of petitioners' remaining claims and ordering dismissal of the complaint for failure to state a claim on which relief can be granted. Pet. App. 56. The court first held that petitioners have no right to judicial review under the APA, relying on the exceptions where "statutes preclude judicial review" or where "agency action is committed to agency discretion by law." *Id.* at 14-24; see 5 U.S.C. 701(a)(1) and (2). With respect to the former, the court recognized that it must "look not only at the express language of the statute but the statutory scheme as a whole." Pet. App. 56, at 15 (citing *Block* v. *Community Nutrition Institute*, 467 U.S. 340, 345 (1984)). It noted that the relevant substantive and judicial review provisions of the INA apply only to aliens within the United States (8 U.S.C. 1105a, 1158, 1253), and that judicial review is unavailable for persons, such as the Haitian aliens here, who are outside the United States. On this basis, the court held that "review under the APA is foreclosed because the relevant provisions of the INA provide the sole and exclusive avenue for judicial review." Pet. App. 56, at 16. In its view, this conclusion was further supported by case law holding that aliens outside the United States have no right to review of immigration determinations. *Id.* at 16-19.

In finding that the actions petitioners challenge are also "committed to agency discretion by law," the court

acknowledged the narrowness of that exception but noted the breadth of the discretion afforded the President by 18 U.S.C. 1182(f) and the absence of any statutory limits on interdiction and repatriation activities and procedures. Pet. App. 56, at 20-21. It further held that, even assuming that other possible sources of law (*e.g.*, the Executive Order, INS guidelines, or the Convention) could form the basis of an APA action, none provided meaningful standards for review of the issues in this case—*i.e.*, the manner in which INS is to conduct refugee screening in the high seas interdiction program. *Id.* at 21-23.

The court of appeals next addressed various theories advanced by the Haitian petitioners that even the district court had rejected. Thus, it held that the INA, as amended by the Refugee Act of 1980, affords no independent basis for relief. Pet. App. 56, at 25-27. The court reasoned that 8 U.S.C. 1253(h), like the entirety of the Section in which it appears, applies only to aliens "in the United States." Pet. App. 56, at 26 (quoting 8 U.S.C. 1253(a)). The court also noted that the asylum provision, 8 U.S.C. 1158, applies only to aliens "physically present in the United States or at a land border or port of entry," and it rejected petitioners' argument that the high seas become the "functional equivalent" of a port of entry whenever the United States conducts interdiction operations. Pet. App. 56, at 26-27. The court of appeals likewise rejected petitioners' argument that either the Executive Order or the INS guidelines could themselves—independently of the APA—create a private cause of action. *Id.* at 28-30. In its view, the terms and purposes of the Executive Order—which specifically contemplates "a procedure taking place entirely on the high seas"—could not have been intended to confer a right of judicial review. *Id.* at 28. The court also ruled that the INS guidelines were intended simply to provide internal instructions to INS employees, and lack the "force and

effect of law" necessary for judicially enforceable rights. *Id.* at 28-30.

Finally, the court rejected petitioner HRC's claim that it has a First Amendment "right of access" to Haitian interdictees on board Coast Guard cutters or at Guantanamo. Pet. App. 56, at 30-38. It first concluded that the precedents upon which HRC and the district court chiefly relied—*NAACP* v. *Button*, 371 U.S. 415 (1963), and *In re Primus*, 436 U.S. 412 (1978)—do not support a broad right of access to persons in government custody, but rather "recognize a narrow First Amendment right to associate for the purpose of engaging in litigation as a form of political expression." Pet. App. 56, at 34. Because such a right of association is "predicated upon the existence of an underlying legal claim that may be asserted by the potential litigant," the court believed it "nonsensical" to find such a right here, since the interdicted Haitians have no enforceable rights under the Constitution or laws of the United States. *Ibid.*

Finally, the court of appeals held that even if HRC had a right to associate with interdicted Haitians, the First Amendment does not impose upon the federal government an affirmative obligation to assist it in exercising that "right" by affording access to aliens in custody aboard Coast Guard ships on the high seas or at a military base in a foreign country. Pet. App. 56, at 34-37. The court recognized that affording such access to HRC would impose substantial burdens on the United States, *id.* at 36-37, and emphasized that the only other appellate decision directly on point had squarely rejected the notion that the government must assist citizens wishing to communicate with aliens who are in custody awaiting administrative proceedings. *Id.* at 37-38 (discussing *Ukrainian-American Bar Ass'n* v. *Baker*, 893 F.2d 1374 (D.C. Cir. 1990)).[5]

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[5] Judge Hatchett dissented. He agreed with the majority that HRC has no constitutional right of access to Coast Guard ships

ARGUMENT

The court of appeals properly rejected petitioners' unprecedented assault upon the prerogatives and duties of the Executive Branch to carry out the Nation's foreign relations, direct military operations abroad, and control illegal immigration. For more than two months, a series of district court injunctions stymied the efforts of the Executive Branch to implement its longstanding policy of interdicting and promptly repatriating Haitian migrants attempting to enter this country illegally. These judicial intrusions into matters committed to the Executive Branch were utterly without basis in the Constitution and laws of the United States, and the court of appeals' holding that petitioners' complaint must be dismissed for failure to state a claim is fully consistent with the decisions of this Court and other courts of appeals. Indeed, with respect to the central legal issues, three other courts of appeals—like the court below—have held that Article 33 of the Refugee Convention is not self-executing (see pages 13-14, *infra*), and the only other court of appeals to have considered the First Amendment claim HRC raises—the D.C. Circuit in *Ukrainian-American*—has likewise rejected it. Accordingly, the legal issues petitioners raise plainly do not warrant review by this Court.

In addition, the district court's sweeping injunctions barring repatriations were wholly improper on equitable grounds. The injunctions fundamentally defeated the purposes of the interdiction program, required the United States to establish camps for Haitian migrants at Guantanamo Naval Base, necessitated the substantial diversion of resources from other military and law enforce-

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on the high seas, but believed that HRC has a right of access to aliens in custody at Guantanamo. Pet. App. 56, at 4-9 dissenting opinion). Judge Hatchett also disagreed with the majority's APA analysis. *Id.* at 10-25. He did not address petitioners' remaining claims. *Id.* at 1 n.1.

ment tasks, and interfered with the conduct of the Nation's foreign relations regarding Haiti and Cuba. Separation of powers principles commit such matters to the political Branches, and preclude the judiciary from granting the extraordinary equitable relief of an injunction having such adverse effects.

This Court's stay of January 31—and the court of appeals' own stays and rulings rejecting petitioners' claims on the merits—have now freed the responsible Executive Departments to carry out the interdiction program and conduct the Nation's foreign policy and military operations at Guantanamo and on the high seas without the direct judicial interference under which they labored for more than two months. But the United States remains committed to restoring democratic rule in Haiti, ensuring that interdictees who truly are refugees under established legal standards are not returned to Haiti without their consent, holding the de facto authorities in Haiti to that country's commitment not to prosecute or persecute individuals because of their departure, and monitoring the repatriation process and related events in Haiti to guard against any persecution of the returnees and others. Since the stays were entered by this Court and the court of appeals on January 31, the repatriation of interdictees who were found not to have a colorable claim of refugee status has proceeded on a regular basis, without incident and without credible reports of retaliation against the returnees.

This case was launched by an ill-considered TRO barring repatriations that was issued at the behest of an organization (HRC) that had no standing to seek that relief; it has since taken on a life and regime of its own and has, regrettably, driven significant aspects of the Nation's immigration, military and foreign policy. We now respectfully request the Court to bring the litigation to a definitive close by an immediate denial of certiorari. That disposition would remove the shadow that the case

continues to cast over the Nation's policies concerning Haiti and the Executive's conduct of its constitutionally assigned responsibilities.

A. 1. Petitioners first contend (Pet. 17, 25-26) that the repatriation of Haitian interdictees violates Article 33.1 of the U.N. Convention. That contention is without merit for a number of reasons.

a. In the first place, Article 33.1 is simply inapplicable in this case. The text of the Article, its negotiating history, and its implementation by the United States all support the official interpretation by the Department of State—which is entitled to great weight, *Sumitomo Shoji Am., Inc.* v. *Avagliano*, 457 U.S. 176, 184-185 (1982)—that Article 33.1 applies only to refugees within the territory of the contracting State.

Article 33.1 provides that a contracting State shall not "expel or return ('refouler') a refugee" to the frontiers or territories where his life or freedom would be threatened for political reasons. Pet. Exh. 3. Although petitioners avoid any discussion of the geographic scope of Article 33.1 in their certiorari petition, they invoke (Pet. 17, 25) Article 33.1 to challenge their "return" to Haiti. Petitioners fail to appreciate, however, that the term "return" in Article 33.1 is expressly defined by the parenthetical insertion of the French word "refouler." As relevant to this case, *Cassell's French Dictionary* 627 (1978), defines "refouler" to mean "expel (aliens)"—a definition that obviously encompasses only aliens physically present in the territory of the contracting State. This construction is confirmed by paragraph 2 of Article 33, which provides that the benefit of non-refoulement may not be claimed by a refugee who is a danger to the security of "the country in which he is." Pet. Exh. 3.

The negotiating history also bears out this interpretation. The delegates to the drafting Conference placed in the record the Conference's understanding that the word "expel" in Article 33.1 refers to a "refugee already

admitted into a country," while the term "return ('refouler')" refers to a "refugee already within the territory but not yet resident." The delegates also placed in the record their understanding that the "possibility of mass migrations across frontiers or of attempted mass migrations"—the precise context in which this case arises—"was not covered by article 33." This history was quoted and relied upon by Judge Edwards in his concurring opinion in *HRC* v. *Gracey*, 809 F.2d 794, 840 n.133 (D.C. Cir. 1987), in which he concluded that Article 33.1 does not apply to the Haitian interdiction program.[6]

Finally, the Protocol incorporating Article 33 was ratified by the United States on the understanding that

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[6] These and other portions of the negotiating history that confirm the State Department's interpretation—as well as the Department's official position in diplomatic undertakings and other forums since that time—are discussed in the government's opening brief (at 16-20 & Addendum B) and reply brief (at 4-7) on the first appeal below, No. 91-6060.

Although petitioners do not address the extraterritoriality issue in the petition, they do include some discussion of the point in Appendix B to their Application for a Stay (at B17-B20). However, they fail to acknowledge the text of Article 33 that cuts against their position. Petitioners do contend (at B17-B-18) that any reliance on the negotiating history is misplaced, ignoring that this Court has made clear that such reliance is appropriate where the meaning of the treaty text is not "obvious." *See United States* v. *Stuart*, 489 U.S. 353, 365-366 (1989); *id.* at 374 (Scalia, J., concurring); *Air France* v. *Saks*, 470 U.S. 392, 400 (1985). Ironically, petitioners then proceed to rely (Stay Applic. App. B18-B19) on statements made by Louis Henkin at a meeting in 1950. However, as explained in the government's reply brief (at 6 n.8) on the first appeal below, Professor Henkin's remarks were made more than a year before the two sessions at which Article 33 was finalized, and they reacted to a different proposal. Moreover, Professor Henkin was not the United States representative at the Conference of Plenipotentiaries (where the definitive negotiating history discussed above occurred and the word "refouler" was inserted); his views were not expressed at the final sessions, and they were not adopted by the Conference.

it conformed to the corresponding provisions of the INA [7]; by that time, this Court had already held, in *Leng May Ma* v. *Barber*, 357 U.S. 185, 187 (1958), that under 8 U.S.C. 1253(h) (1958), even aliens who were physically present in the United States, but not lawfully admitted, were ineligible for withholding of deportation. See *INS* v. *Stevic*, 467 U.S. 407, 415, 417-418 (1984). A fortiori, the interdictee petitioners in this case, who are altogether outside the United States (in Cuba or on the high seas), have no rights under Article 33.1.[8] Petitioners cite no judicial ruling to the contrary. Their reliance on Article 33.1 therefore may be dismissed on this ground alone.

b. The court of appeals found it unnecessary to decide whether Article 33.1 could be judicially extended to the

[7] See S. Exec. Doc. K, 90th Cong., 2d Sess. III (1968) (message from Pres. Johnson) ("Accession to the Protocol would not impinge adversely upon established practices under existing laws in the United States."); *id.* at VII, VIII (report of Secretary of State Rusk) (same); S. Exec. Rep. No. 14, 90th Cong., 2d Sess. 4 (1968) ("refugees in the United States have long enjoyed the protection and the rights which the protocol calls for"); 114 Cong. Rec. 29,391 (1968) (Sen. Mansfield).

[8] Commentators likewise have concluded that Article 33.1 does not apply outside of a contracting party's territory. 2 A. Grahl-Madsen, *The Status of Refugees in International Law* 94 (1972); N. Robinson, *Convention Relating to the Status of Refugees: A Commentary*, at 162-163 (1953); Hailbronner, *Non-Refoulement and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?*, 26 Va. J. Int'l L. 857, 861-862 (1986); Weis, *The United Nations Declaration on Territorial Asylum*, 7 Can. Y. Int'l L. 92, 123-124 (1969). Petitioners cite (Pet. 3, 28) the direction to the Attorney General in Section 3 of the Executive Order to ensure "strict observance" of existing "international obligations." However, Section 3 does not purport to identify specific sources of law (compare §§ 2(b)(1) and (2) (referring to the Convention on the High Seas)) or to expand any existing international obligations of the United States. The Executive Order therefore does not assist petiitoners in seeking a judicial extension of Article 33.1 beyond the territory of the United States.

high seas or foreign soil, because it held that, in any event, "Article 33 is not self-executing and thus provides no enforceable rights to the Haitian plaintiffs in this case." Pet. App. 43, at 3. That ruling (which the en banc court, without dissent, declined to disturb) is correct and is in agreement with the decisions of the other courts that have addressed the issue. See *Bertrand* v. *Sava*, 684 F.2d 204, 218-219 (2d Cir. 1982) ("the Protocol's provisions were not themselves a source of rights under our law unless and until Congress implemented them by appropriate legislation"), *Pierre* v. *United States*, 547 F.2d 1281, 1288 (5th Cir.) ("no new rights or entitlements were vested * * * by operation of the Protocol"), vacated on other grounds, 434 U.S. 962 (1977); *United States* v. *Aguilar*, 883 F.2d 662, 680 (9th Cir. 1989) ("Neither the Handbook nor the Protocol have the force of law * * *. The Protocol was not intended to be self-executing."), cert. denied, 111 S. Ct. 751 (1991); *HRC* v. *Gracey*, 600 F. Supp. 1396, 1401, 1406 (D.D.C. 1985), aff'd on other grounds, 809 F.2d 794 (D.C. Cir. 1987).[9]

[9] In Appendix B to their Stay Application (at B13), but not in the certiorari petition, petitioners assert a conflict with the Fifth Circuit's decision in *Nicosia* v. *Wall*, 442 F.2d 1005 (1971). However, *Nicosia* did not discuss the self-execution issue; it simply assumed that Article 33.1 could be raised as a defense in an extradition proceeding. 442 F.2d at 1006. Moreover, the Fifth Circuit subsequently held in *Pierre*, cited in the text, that Article 33.1 is *not* self-executing. There accordingly is no circuit conflict on the issue.

Petitioners also cite (Stay Applic. App. B15) the description of the Protocol as "self-executing" in *In re Dunar*, 14 I. & N. Dec. 310, 313 (BIA 1973). However, this Court has found *Dunbar* to be "not particularly probative of what the Protocol means." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 439 n.23 (1987). And contrary to petitioners' assertion, as the decision of an inferior administrative body, *Dunar* binds neither the Attorney General nor the remainder of the Executive Branch. Moreover, *Dunar* concluded—in agreement with the uniform judicial view—that the Protocol did not affect the coverage or execution of existing U.S. law. 14 I. & N. Dec. at 313-323.

Treaties of the United States do not ordinarily create rights that are privately enforceable in U.S. courts. See *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 442 (1989); *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 808-810 (D.C. Cir. 1984) (Bork, J., concurring), cert. denied, 470 U.S. 1003 (1985); *Handel* v. *Artukovic*, 601 F. Supp. 1421 (C.D. Cal. 1985). An individual ordinarily can enforce a treaty in court only if it provides a private right of action. See, *e.g.*, *Head Money Cases*, 112 U.S. 580, 598-599 (1884).

Here, the text of the Protocol itself indicates that the parties did not understand it to create private rights of action, but instead contemplated implementation through the domestic law of each contracting State. Article III requires signatories to communicate the means by which they intend to implement the Protocol, thereby indicating that it left the matter of domestic implementation to the parties. See *Gracey*, 600 F. Supp. at 1406.[10] "Such provisions are uniformly declared executory." *United States* v. *Postal*, 589 F.2d 862, 876-877 (5th Cir.), cert. denied, 444 U.S. 832 (1979); see *Tel-Oren*, 726 F.2d at 809 (Bork, J., concurring); *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287, 1298-1299 (3d Cir. 1979). Moreover, as we have explained (see page 12, *supra*), the clear understanding of the President and Congress was that the Protocol would not itself be an independent source of rights, but rather would be subsumed within and reconciled with existing domestic law. Similarly, Congress's subsequent attempt, in the Refugee Act of 1980, to clarify domestic law to indicate its agreement with the Protocol, see *INS* v. *Stevic*, 467 U.S. at 425-428,

[10] See also Executive Comm. of the UNHCR Programme, Conclusion No. 57 (XL), *Implementation of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (1989) (emphasizing "the need for the full and effective implementation of these instruments by Contracting States").

is inconsistent with the notion that the Protocol was enforceable of its own force.[11]

But even if the Protocol were self-executing in the sense that a court (or administrative body) might refer to it for a rule of decision in disposing of a deportation or exclusion case that was otherwise within its statutorily-conferred jurisdiction, it still would not follow that the Protocol authorizes a court to fashion a novel cause of action for affirmative injunctive relief where Congress has not authorized such a suit. That is especially so as regards persons and events *outside* the United States, where the laws of the United States are presumptively inapplicable, *EEOC* v. *Arabian American Oil Co.*, 111 S. Ct. 1227 (1991)—and where, as here, injunctive relief would interfere with military operations on the high seas and a base on foreign soil. Cf. *Argentine Republic*, *supra*.

[11] While petitioners cite (Stay Applic. App. B12, B14, B16) several statements in decisions of this Court or materials preceding ratification that the Protocol is "mandatory" and "obligates" or "binds" the United States to comply with provisions of the Convention, that is not the question here. All treaties are binding and create obligations. The question is to *whom* do the obligations run? By acceding to the Protocol, the United States became obligated to other contracting States to comply with its provisions, but domestic implementation was necessary for the Protocol to be effectuated in the United States. As it happened, Section 243(h) of the INA already provided the necessary statutory mechanism for withholding of deportation. Petitioners rely (Stay Applic. App. B16) on the statement in Justice Scalia's dissenting opinion in *INS* v. *Doherty*, No. 90-925 (Jan. 15, 1992), slip op. 3, that the "nondiscretionary duty imposed by § 243(h) parallels the United States' mandatory *nonrefoulment* obligations under Article 33.1." This statement, however, indicates that the judicially enforceable rights at issue stemmed from the implementing legislation, not directly from the "parallel" obligations of the United States under Article 33.1. Similarly, the discussion in *Stevic* (467 U.S. at 429 n.22) and *Cardoza-Fonseca* (480 U.S. at 440-441), upon which petitioners also rely (Stay Applic. App. B15-B16), in fact confirms that statutory implementation was necessary to give "domestic effect to Article 33.1.

c. Finally, if we assume (contrary to our submission) that Article 33.1 applies outside the territory of the United States and is self-executing, petitioners still would not be entitled to judicial relief. Because Section 2(c) of the Executive Order directs the Coast Guard not to return a refugee to his country of origin without his consent, there is no inconsistency between the interdiction program and the substantive nonrefoulement principle in Article 33.1. To the extent petitioners seek to change the internal procedures for implementing the Executive Order, Article 33.1 likewise furnishes them no assistance, because it does not prescribe particular procedures for the determination of refugee status, and thus mandates no particular role for administrative and judicial officials in the supervision of refugee determinations. Indeed, the U.N. High Commissioner has observed that state parties to the 1951 Convention and the 1967 Protocol "vary considerably" in their practices, including the determination of refugee status by informal, or *ad hoc*, means. See Office of the U.N. High Commissioner for Refugees, *Handbook On Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* ¶ 191, at 45 (1988). Clearly, then, Article 33 provides no support for petitioners' attack on the interdiction and repatriation program.

2. Even the district court was unpersuaded by the remaining documents and statutory provisions on which the Haitian petitioners rely in seeking to establish personal rights, cognizable in U.S. courts, under the President's interdiction program. Pet. App. 42, at 52-54. The court of appeals affirmed the rejection of those claims. Pet. App. 56, at 25-30. Those rulings are correct and do not conflict with the decision of any other court, and they therefore do not warrant review here.

a. Nothing in the Executive Order suggests a purpose to create private, judicially enforceable rights. In the

first place, the Order's statement that "no person who is a refugee will be returned without his consent" (see Pet. 3, 17, 28) is a mere proviso to the President's description of what the internal instructions from the Secretary of Transportation to the Coast Guard regarding the interdiction program should include—specifically, a requirement that the Coast Guard return the interdicted vessel and its passengers to the country from which it came, where there is reason to believe that an offense is being committed. § 2(c)(3). "[B]ecause a proviso can only operate within the reach of the principal provision it modifies," *County of Yakima* v. *Confederated Tribes & Bands of the Yakima Indian Nation*, No. 90-408 (Jan. 14, 1992), slip op. 10, the proviso here is part of the internal instructions to the Coast Guard, rather than a source of personal rights on the part of individuals external to the Coast Guard's operations.

Furthermore, as the court of appeals pointed out, the Executive Order specifically contemplates interdiction and screening on the high seas, under inherently exigent circumstances and with prompt repatriation of aliens who are found not to qualify for refugee status. Pet. App. 56, at 28. That procedure allows no time or feasible mechanism for judicial review at the behest of affected aliens. Compare *Morris* v. *Gressette*, 432 U.S. 491, 503-505 (1977). In fact, although the Executive Order is unquestionably a valid exercise of the broad Presidential authority granted by the pertinent statutory provisions, 8 U.S.C. 1182(f), 1185(a)(1), nothing in those sections evinces any congressional intent to delegate authority to create private rights of the sort ordinarily necessary for an Executive Order to have the "force and effect of law." See *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 304-306 (1979).

b. The foregoing principles apply with even greater force to INS's internal "Interdiction Guidelines and Operation Instructions" (see Pet. Exh. 7-9) on which

petitioners also rely (Pet. 3, 25, 28). Like the Executive Order under which they were issued, the guidelines lack the "force and effect of law," because they lack a nexus to "some delegation of the requisite legislative authority by Congress." *Chrysler Corp.*, 441 U.S. at 304. As a result, the guidelines are merely internal agency directives of the sort that do not confer any enforceable rights or benefits. *Pasquini* v. *Morris*, 700 F.2d 658, 662 (11th Cir. 1983); *Dong Sik Kwon* v. *INS*, 646 F.2d 909, 918-919 (5th Cir. 1981).

c. Finally, petitioners have no rights under Sections 208 and 243(h) of the INA. As the district court pointed out, "the statutory rights and protections asserted are reserved, by the very terms of the statutes, to aliens within the United States." Pet. App. 42, at 53 (citing 8 U.S.C. 1158 (establishing asylum procedures only for aliens "physically present in the United States or at a land border or port of entry"), and 8 U.S.C. 1251 and 1253(a) (prescribing deportation procedures for aliens "in the United States")). The court of appeals agreed. Pet. App. 56, at 25-27; see also *Gracey*, 600 F. Supp. at 1404. Relief for refugees outside the United States is instead governed by Section 207 of the INA, 8 U.S.C. 1157, which commits such matters to the discretion of the President, in consultation with Congress, and to the discretion of the Attorney General, in implementing the President's decisions—without any provision for judicial review.

Petitioners point out (Stay Applic. App. B29-B30) that prior to its amendment by the Refugee Act of 1980, Section 1253(h) provided that "[t]he Attorney General is authorized to withhold deportation of any alien within the United States," but that the phrase "within the United States" was deleted and a prohibition against "return" of an alien was added in 1980. In petitioners' view, these changes suggest a congressional intent to extend the benefits of Section 1253(h) to any alien, anywhere in the world, who asserts to United States officials

a fear of persecution. That remarkable result would conflict with the limitation of the deportation provisions of the Act (of which Section 1253(h) is a part) to aliens within the United States; contravene the rule against extraterritorial application of an Act of Congress in the absence of a clear statement to that effect; and lack any support in the legislative history. Further, paragraph (2)(C) of 8 U.S.C. 1253(h), also added in 1980, requires reference to the alien's conduct "prior to the arrival of the alien in the United States" in determining his eligibility for relief.

This Court has concluded that the 1980 amendments to Section 1253(h) were designed for the far more modest purpose of conforming its language to Article 33 of the Convention. *Stevic*, 467 U.S. at 421.[12] Article I(F) of the Convention confirms that Article 33 does not apply extraterritorially, because, like 8 U.S.C. 1253(h)(2)(C), it conditions eligibility on the alien's conduct "prior to his admission" to the contracting State. Moreover, the legislative history of the Refugee Act of 1980 shows that the Convention (and thus 8 U.S.C. 1253(h)) were understood to apply to "refugees within the territory of the contracting states." H.R. Rep. No. 608, 96th Cong., 1st Sess. 17 (1979). This background refutes the interdictee petitioners' assertion that Congress has

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[12] The term "return" in Article 33 of the Convention applies only to an alien who is already within the territory of the country (see page 11, *supra*), and there is no reason to believe that the addition of that term to 8 U.S.C. 1253(h) in 1980 had any different import. By the same token, the deletion of the phrase "within the United States" could, at most, have extended 8 U.S.C. 1253(h) to exclusion proceedings, since it was that phrase the Court found significant in *Barber* in holding that Section 1253(h) did not apply in such proceedings. That question will not arise in the future, because the Attorney General, by regulation, has extended to aliens subject to exclusion proceedings the right to seek the relief afforded by 8 U.S.C. 1253(h). See 8 C.F.R. 236.6. In no event, however, would these textual changes give world-wide scope to Section 1253(h).

extended the relevant provisions of U.S. law to the high seas and foreign soil.

3. Finally, the Haitian petitioners invoke the APA to challenge the operation of the interdiction and repatriation program. Pet. 25, 26, 27; Stay Applic. App. B20-B29. As we have explained, however, none of the underlying sources on which the interdictees rely—Article 33.1 of the Convention, the Executive Order, the INS Guidelines, or the INA—affords them any substantive or procedural rights, much less rights that are cognizable in U.S. courts. The interdictees cannot overcome that fundamental defect simply by citing the APA.

Moreover, although the APA permits review of a broad range of administrative actions, it is unavailable where "statutes preclude judicial review" or "action is committed to agency discretion by law." 5 U.S.C. 701 (a). And the "presumption" of reviewability on which petitioners rely (Stay Applic. App. B23-B24) "runs aground when it encounters concerns of national security," and is inapplicable to matters affecting foreign affairs. *Department of the Navy* v. *Egan*, 484 U.S. 518, 527 (1988); *Chaney* v. *Heckler*, 718 F.2d 1174, 1195 (D.C. Cir. 1983) (Scalia, J., dissenting), rev'd, 470 U.S. 821 (1985). Against this background, the court of appeals correctly held that judicial review is foreclosed by both exceptions in 5 U.S.C. 701(a). Once again, that holding does not conflict with any decision of this Court or another court of appeals, and it presents no issue warranting review.

a. As the court of appeals properly recognized, the INA precludes judicial review of claims to asylum by aliens outside the United States. Pet. App. 56, at 15-19. The INA expressly creates rights of review regarding asylum and withholding of deportation claims, but only for aliens "physically present in the United States or at a land border or port of entry" (8 U.S.C. 1158(a)) or aliens "in the United States," and thus subject to the deportation provisions. See 8 U.S.C. 1105a, 1226, 1227,

1253(a). These limitaitons, "fairly discernible in the statutory scheme," leave no question that Congress intended to bar review at the behest of aliens beyond our borders. *Block* v. *Community Nutrtion Institute*, 467 U.S. at 351 [13]; cf. *Ardestani* v. *INS*, 112 S. Ct. 515, 518-519 (1991) (APA inapplicable to administrative procedures under INA).

As the court of appeals also noted, permitting judicial review here, notwithstanding the scheme of the INA, would conflict with a long history of decisions recognizing that Congress has never permitted judicial review of immigration decisions affecting aliens who are outside the United States and have "never presented [themselves] at the borders." *Brownell* v. *Tom We Shung*, 352 U.S. 180, 184 n.3 (1956); see Pet. App. 56, at 17-19. This principle is reflected, for example, in the settled rule that visa decisions by U.S. consular officials are wholly unreviewable, under the APA or otherwise. See *Li Hing of Hong Kong, Inc.* v. *Levin*, 800 F.2d 970, 971 (9th Cir. 1986); *Pena* v. *Kissinger*, 409 F. Supp. 1182, 1185-1186 (S.D.N.Y. 1976). It also is reflected in Section 207 of the Act, which commits matters concerning the admission of refugees from outside the United States to the discretion of the President and the Attorney General, without any provision for judicial review. There is no reason why Haitians on the high seas or in Cuba should have any greater right to judicial review of actions or procedures regarding their claims to refugee status and discretionary relief than those who enter the U.S. embassy in Haiti to seek relief from U.S. consular officials.[14]

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[13] See also *United States* v. *Fausto*, 484 U.S. 439 (1988) (provision for judicial review under Civil Service Reform Act of 1978 for certain categories of employees by implication precludes judicial review for other classes of employees).

[14] Petitioners (Stay Applic. App. B22 n.14) and Judge Hatchett (Pet. App. 56, at 12-13) miss the point by focusing on whether aliens abroad are "persons" for purposes of the APA. The court

b. The court of appeals also correctly held that the subject of petitioners' challenge—the processing of refugee claims of aliens outside the country—is "committed to agency discretion by law." 5 U.S.C. 701(a)(2). Where the applicable statute "is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion," APA review is precluded. *Heckler* v. *Chaney*, 470 U.S. at 830. In this case the INA furnishes no standards by which a court could assess the propriety of Coast Guard and INS actions in the interdiction program. On the contrary, Congress has granted the President broad discretion to act with regard to the exclusion of aliens "as he shall deem necessary." 8 U.S.C. 1182(f); see also 8 U.S.C. 1185(a)(1). Such provisions provide no discernible standards for judicial review. *Webster* v. *Doe*, 486 U.S. 592, 600-601 (1988).

Nor is there "law to apply," *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971), in the several documents upon which plaintiffs rely, because none purports to lay down any firm rules regarding the *procedures* by which refugee determinations must be made. The Executive Order consists merely of general instructions from the President to Members of his Cabinet regarding the implementation of a law enforcement program. The court of appeals correctly pointed out that the proviso in Section 2(c)(3) "that no person who is a refugee will be returned without his consent" says nothing about how the INS is to determine who is a refugee. Pet. App. 56, at 22. Similarly, the broad instruction to the Attorney General in Section 3 of the Order—to "take whatever steps are necessary" for the fair enforcement of the immigration laws—says nothing about what "steps" he may deem "necessary" to that end. Nor do the INS guidelines provide any standards appropriate for judicial enforcement. Although they offer—consistent with their title—internal operating *guidelines* as to some aspects of conducting interviews, they are prefaced by the recognition that the decision whether shipboard interviews are logistically possible at all must depend upon the discretionary military judgments of the commanding officer of the Coast Guard vessel in question that such activities are "safe and practicable" under the circumstances. Pet. Exh. 9. As demonstrated by the experience in this case, the commitment of pre-screening interviews to the discretion of INS is also strongly reinforced by the disruption of operations that would be caused by judicial review, and by the difficult nature of the judicial inquiry into the details of interviews that occur abroad. Cf. *Colon* v. *Carter*, 633 F.2d 964, 966-967 (1st Cir. 1980) (refusing review of the transfer of refugees to Fort Allen, Puerto Rico); *Perales* v. *Casillas*, 903 F.2d 1043, 1047-1048 (5th Cir. 1990) (declining review of INS voluntary departure determinations).[15]

It is no answer to suggest, as petitioners did below, that while the President's actions in this setting are unreviewable, those of his subordinates in carrying out his directives are not. See Pet. App. 56, at 27. That argument would destroy the President's discretion in all matters other than those that he can execute personally. Yet when the President's subordinates act in the sensitive areas of foreign affairs, border protection, and military

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of appeals did not rest its holding on a contrary proposition, and this case presents no occasion to consider whether aliens outside the United States may ever invoke federal court jurisdiction to bring an APA action. But see *Johnson* v. *Eisentrager*, 339 U.S. 763, 777-778 (1950). Even if we assume, *arguendo*, that such an action might lie, it is the carefully drawn scheme of the INA—which expressly affords judicial review of many immigration matters, while committing others to the sound discretion of the Executive—that bars the present action by aliens outside the United States.

[15] Similarly, as we have explained (see pages 16-17, *supra*), Article 33.1 of the Convention—even if it applied—would prescribe no particular procedures for making refugee determinations.

operations at issue here, "their acts are his acts" and are equally beyond the power of a court to control. *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 166 (1803). If a court presumed to interpret the President's orders to his subordinates, assess whether they have effectively carried out the orders, and prescribe the consequences if it believes they have not done so, it would effectively seize all the President's discretion to itself. It would thereby ignore the important fact that the President's control of his subordinates combines a complex system of written directives, oral instructions, and continual monitoring that may result in a constantly evolving pattern of action. To impose on this system a judicial process that moves with untoward slowness may prevent development of policies that can deal effectively with changing world events. Under our system of government, a court's injunctive authority is no substitute for the authority of the President to hire, direct and fire those whom he chooses to implement such policies.

c. Finally, even if judicial review under the APA is not entirely foreclosed by the exceptions in 5 U.S.C. 701(a), the APA does not excuse the courts from their duty "to dismiss any action or deny relief on any other appropriate legal or equitable ground." 5 U.S.C. 702(1). That provision was enacted as part of the 1976 amendments implementing the recommendations of the Administrative Conference of the United States (H.R. Rep. No. 1656, 94th Cong., 2d Sess. 4 (1976); S. Rep. No. 996, 94th Cong., 2d Sess. 3 (1976)), which were designed *inter alia*, to ensure that the waiver of sovereign immunity in the APA did not allow courts to "decide issues about foreign affairs, military policy, and other subjects inappropriate for judicial action" See *Sovereign Immunity: Hearing Before the Subcomm. on Admin. Practice and Procedure of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 135 (1970) (report of the Administrative Conference Committee on Judicial Review). As we have explained in our January 30, 1992, application

to this Court for a stay pending appeal (at 16-18, 37-39) and in our memorandum of this date opposing petitioners' application for a stay pending certiorari, the injunctive relief repeatedly granted by the district court in this case impermissibly intruded into those very areas. If the district court instead had "pa[id] particular regard for the public consequences in employing the extraordinary remedy of injunction." *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 312 (1982), it would have dismissed petitioners' action (as the court of appeals has, at last, ordered), for "[t]he separation of powers problems present here make this virtually a textbook case for refusing * * * discretionary relief." *Ramirez de Arellano* v. *Weinberger*, 745 F.2d 1500, 1561 (D.C. Cir. 1984) (en banc) (Scalia, J., dissenting), vacated on other grounds, 471 U.S. 1113 (1985). The Court should allow that dismissal of this unprecedented suit to stand.

B. The bulk of the argument in the certiorari petition is devoted not to the contentions on behalf of the interdicted aliens, discussed above, but to the baseless contention by petitioner HRC that it has a First Amendment right to have its representatives enter a U.S. military base in a foreign country or board a U.S. military vessel on the high seas to meet with interdictees who are held in custody. See Pet. 14-17, 20-25. We have fully answered that contention in our January 30, 1992, application (at 22-37) for a stay of the injunction based on this First Amendment claim (which the Court granted), and there accordingly is no reason to repeat that entire discussion here. The court of appeals has now rejected HRC's First Amendment claim, largely for the reasons set forth in our stay application. Pet. App. 56, at 30-38.

The First Amendment ruling below is in full agreement with the only other appellate decision to have considered a similar claim—the D.C. Circuit's decision in *Ukranian American*, which found no right of access even with respect to an alien in custody in the United States—and is fully consistent with this Court's decisions. *A for-*

tiori, there could be no conceivable basis for reinstating the district court's December 20, 1991, injunction barring repatriation of interdictees until HRC has exercised its supposed right of access. Only the individual interdictees (not HRC) have standing to prevent their repatriation. *Whitmore* v. *Arkansas*, 110 S. Ct. 1717, 1725-1726 (1990). Significantly, HRC does not attempt to defend the proposition that it is entitled to an injunction barring repatriations on First Amendment grounds. There accordingly is no basis for the Court to grant certiorari on the First Amendment issue.

Indeed, Judge Hatchett, who was otherwise sympathetic to petitioners' claims, agreed with the majority below that HRC has no First Amendment right of access to Coast Guard cutters. Pet. App. 56, at 4 (dissenting opinion); compare *Gracey*, 809 F.2d at 800 (characterizing such a claim as "frivolous"). Because the program of interdiction, interview, and repatriation is designed to (and did for ten years) take place entirely on Coast Guard cutters—and because interdictees are now in custody at Guantanamo only as a result of the wholly unwarranted injunctions previously entered in this case—it is especially clear that HRC's First Amendment claim does not warrant review.

It bears reiteration that the individual interdictees, who are outside the United States, have no rights under the First Amendment to associate with or speak to representatives of HRC or to petition the United States Government for redress of grievances. Pet. App. 42, at 44-45 n.19; see *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 265, 271 (1990); *United States ex rel. Turner* v. *Williams*, 194 U.S. 279, 292 (1904). Undeterred by this lack of reciprocal rights on the part of the persons with whom it claims a constitutionally protected right to associate, HRC insists that the First Amendment affords it a right of access to Coast Guard cutters and Guantanamo to speak with and offer legal advice to individual interdictees. However, the interdictees likewise have no

right to the assistance of counsel in connection with the screening process. The absence on the part of the interdictees to *receive* the assistance of counsel is fatal to any assertion by HRC of a constitutional right to *furnish* such assistance. Counsel cannot rely on their own asserted First Amendment rights to intrude themselves into a process in which counsel otherwise have no role, and courts cannot rely on the interests of parties external to an administrative process to impose additional requirements that neither Congress nor the agency has chosen to adopt. Cf. *Vermont Yankee Nuclear Power Corp* v. *NRDC, Inc.*, 435 U.S. 519 (1978).

This conclusion is especially sound here, because the asylum pre-screening process is designed to determine, in an informal, nonadversarial setting, whether an interdictee exhibits a credible fear of persecution. The screening process is necessarily brief, designed to take place on Coast Guard cutters. As the court of appeals poinnted out (Pet. App. 56, at 36-37), providing access to cutters would impose a "substantial burden" on the government. In addition, the presence of counsel would be incompatible with the informal and nonadversarial nature of the screening interview. Contrary to petitioners' contention (Pet. 12-13, 14, 15-17, 20-22) there is nothing improper—or impermissibly "content-" or "viewpoint-based"—about INS's decision to protect the informality and nonadversarial nature of its screening process in this manner, especially in the custodial setting of a military vessel or base, to which the public at large is not invited. *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 323-326 (1985); see also *Wolff* v. *McDonnel*, 418 U.S. 539, 570 (1974) (no right to counsel at prison disciplinary proceeding); *United States* v. *Gouveia*, 467 U.S. 180, 185 n.1 (1984).[16]

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[16] Petitioners cite solely to the November 20, 1991 Declaration of Robert K. Wolthuis (Pet. 19 n.17) to support their extraordinary assertion that respondents have relied upon "fraudulent

If the government must allow representatives of HRC to board a Coast Guard cutter or enter Guantanamo so they can speak with and advise interdictees held in custody there, any organization or person interested in assisting or advising interdictees would have a similiar First Amendment claim. See *Ukranian-American*, 893 F.2d at 1381-1382. The fact that HRC's organizational purpose is concerned with Haitian migrants does not give it an interest distinct from any other member of the public in this regard. Cf. *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 485-486 (1982).

Nor is HRC's position advanced by its reliance (Pet. 20, 22-24) on its status as counsel in this class action. Otherwise, an organization could circumvent wholly legitimate custodial arrangements and administrative procedures—and claim a right to alter them on a program-

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declarations" (Pet. 18) in this case. That declaration, along with five others, was submitted in the district court in support of the government's motion to vacate or stay the temporary restraining order issued the previous day—just hours after petitioners filed their complaint. It appears to have been cited twice on appeal, in our November 21, 1991 stay motion (in No. 91-6027, at 7) and in our December 4, 1991 stay motion (in No. 91-6060), both times for the noncontroversial proposition that the United States had initiated a multinational diplomatic effort to deal with the Haitian crisis—a proposition independently supported by the concurrent citation in both motions to the Declaration of Assistant Secretary of State Bernard W. Aronson, also filed in the district court on November 20. Moreover, as plainly revealed in the very deposition testimony cited by petitioners, there was nothing sinister about Mr. Wolthuis' acting in the capacity of Assistant Secretary of Defense for International Security Affairs on November 20, 1991, the day he was called upon to execute a declaration as the temporary head of the office. The Assistant Secretary position had been vacant since late August; Mr. Wolthuis was the Deputy Assistant Secretary of Defense for Global Affairs; and when the principal deputy, who usually served as Acting Assistant Secretary was out of the country (as he was on that day), the position is temporarily filled by one of the remaining deputies on a rotating basis. See Pet. App. 78, at 5-6.

wide basis—through the simple expedient of filing a lawsuit. Moreover, HRC acts as counsel only with respect to the class claims in this litigation; that is something quite different from serving as counsel to each interdictee with respect to his own potential claim for asylum.

Finally, there is no merit to petitioners' legal contention (Pet. 15-17, 20-22), made for the first time in this Court, that respondents have arbitrarily denied access to HRC, while broadly permitting access to Guantanamo and even Coast Guard cutters to others.[17] As detailed in the Affidavit of John W. Cummings, Acting Assistant Commissioner of INS for Refugees, Asylum and Parole, the present policy is to permit access only to the following non-government personnel: (1) persons approved to participate in the screening process in some official capacity, such as the UNHCR; (2) members of the press, whose access does not include attendance at actual interviews; and (3) certain others, such as religious workers, who may furnish essential services to the aliens. Cummings Aff. ¶¶ 10-11 (Pet. App. 71).

Petitioners can establish no flaw in these criteria as means of regulating access. The presence of representatives of UNHCR or comparable organizations to observe and assist in the official business of the camps in no way imparts an obligation to allow private groups, such as HRC, to do the same or to enter the camps for other purposes. Similarly, providing limited access to members of the press—whose purpose of informing the American

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[17] As the court of appeals observed (Pet. App. 56, at 32 n.7), the district court noted that there was no allegation that the denial of access to HRC was the product of viewpoint discrimination, and petitioners' brief on appeal likewise did not claim discrimination. Moreover, although the district court observed in its December 20 order that the government had granted access to Guantanamo by the U.N. High Commissioner for Refugees (UNHCR) and the press (Pet. App. 46, at 9), that did not constitute a finding of viewpoint discrimination. Rather, it appears to have been an effort to justify the court's First Amendment-based injunction against repatriations, on the ground that it would not be intrusive.

public about the events transpiring in the interdiction program is altogether different (and less intrusive) than the role of counsel that HRC seeks to play—is an eminently reasonable accommodation, fully consonant with First Amendment values. And in support of its assertion that the government has opened the camps to other groups, HRC cites two affidavits describing visits by a priest and by an organization called Lutheran Ministries. See Pet. 22 n.19 (citing Punancy Aff. (Pet. App. 31) and Wenski Aff. (Pet. App. 68)). The fact that such an organization was given access in no way undermines the legitimacy of the policy outlined above—even if, in one instance, it turned out that the visit went beyond religious ministry and included the sort of activities in which HRC seeks to engage. Punancy Aff. ¶¶ 1-2, 5.

In any event, as we have pointed out above (see page 4, *supra*), HRC *was* granted access to camps and cutters at Guantanamo through the visit of its team of lawyers and support staff in November 1991. HRC does not show —or even claim—that this access was inferior to that granted any comparable group. Petitioners' belated reformulation of their sweeping First Amendment claim into one of discrimination therefore manifestly does not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

92 Civ. 1258

Johnson, J.

HAITIAN CENTERS COUNCIL, INC., ET AL., PLAINTIFFS

vs.

GENE MCNARY, Commissioner, Immigration and Naturalization Service, ET AL., DEFENDANTS

PLAINTIFFS' NOTICE OF MOTION FOR PROVISIONAL CLASS CERTIFICATION

SIRS:

PLEASE TAKE NOTICE that on the 1st day of April, 1992 at 2:00 p.m., or as soon thereafter as counsel may be heard, the undersigned attorneys for the plaintiffs, will move before the Honorable Sterling Johnson sitting at the United States District Court House for the Eastern District of New York, Brooklyn, New York for an Order pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure declaring that the above-entitled action be provisionally maintained as a class action on behalf of classes consisting of:

1. All Haitian citizens who have been or will be "screened-in" or who have been "screened-in" and subsequently screened out, including those who have been or may be subject to or who have resisted additional screening procedures, and are now or will be detained on Guantanamo Bay Naval Base, any other territory subject to United States jurisdiction or Coast Guard cutters (hereinafter "screened-in plaintiffs");
2. All Haitian citizens who have retained or will retain or wish to retain plaintiff Haitian Service

Organizations as counsel or who have the right to obtain assistance of counsel from Haitian Service Organizations and/or other persons (hereinafter "Haitian Service Organization clients");

3. All legal residents and citizens of the United States who are fathers, mothers, sons, daughters, siblings, cousins and close relations of members of any of the above classes who have been deprived of their rights to associate with their immediate relatives because of defendants' actions (hereinafter "immediate relatives").

TAKE FURTHER NOTICE that in support hereof plaintiffs shall rely upon the memorandum of law filed herewith and the pleadings and other papers heretofore filed in this action.

Dated: April 1, 1992
New York, New York

Respectfully submitted,

CENTER FOR CONSTITUTIONAL RIGHTS

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BY FAX
April 22, 1992

Mr. Francis J. Lorson, Esq.
Chief Deputy Clerk
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RE: Gene McNary, et al. v. Haitian Centers Council, Inc., et al. (Civ. No. 92-1258 E.D.N.Y.), *appeal pending*, No. 92-6090 (2d Cir. 1992) (Second Circuit argument scheduled May 7 or 8, 1992)

Dear Mr. Lorson:

We understand that the Solicitor General's application to Justice Thomas, as Second Circuit Justice, for a stay pending appeal to the Second Circuit of Judge Sterling Johnson's preliminary injunction order in this case has been referred to the Conference. We respectfully request that you transmit this letter to the full Court for its consideration.

Attached to the Government's application at page 190 is the uncross-examined Declaration of Donna Hrinak, Deputy Assistant Secretary of States for Mexico and Caribbean Affairs, Bureau of Inter-American Affairs,

dated April 20, 1992, which was not part of the record before the District Court in this case. Ms. Hrinak's declaration cites recent Coast Guard figures regarding the interdiction of fleeing Haitians, claims "that the injunctive relief ordered by the District Court in this case has contributed in significant part to the increased outflow of Haitians from Haiti," *id.* at 190, and concludes that "the mere existence of pending litigation, and particularly the existence of any kind of injunctive relief against the United States Government, acts as a magnet for Haitians to leave Haiti." *Id.* at 193.

As we noted on page 12 of our Memorandum requesting Summary Denial of the Government's Extraordinary Application for a Stay Pending Appeal, after a five and one-half hour hearing that included live testimony, Judge Johnson's preliminary injunction opinion found the Government's evidence regarding such a "magnet effect" to be "inconclusive." PI Op. at 12. At the preliminary injunction hearing, the Government presented absolutely no evidence to link the increased number of Haitian interdictees with the District Court's order. On the other hand, respondents presented numerous reasons why Haitians have been interdicted in large numbers in the last few weeks, including evidence that substantial numbers of Haitians who had landed in Cuba had recently been expelled onto the high seas by Castro. *See* PI. Exh. # 69 at 62; PI Transcript at 108-11.

Given this background, the Hrinak Declaration filed yesterday appears to be yet another Government attempt to use uncross-examined extra-record affidavits manufactured for the purpose of appellate litigation to mislead the Supreme Court to stay this Court's lawful order. The Government has now failed to stay that order on four successive occasions, twice before Judge Johnson and twice before the Second Circuit (Pratt, Timbers & Mukasey, JJ.). In *Haitian Refugee Center v. Baker*, 112 S.Ct. 1245 (1992), an earlier case before this Court, the Solicitor

General's successful January 31, 1992 application to this Court for a stay of the District Court's injunctive relief similarly relied upon untested allegations in extra-record affidavits that did not survive subsequent cross-examination.[1]

To forestall another round of such Government misconduct, following the filing of the stay application yesterday, respondents sought a status conference with Judge Johnson, on the record, and requested that he permit us to take the deposition of Ms. Hrinak immediately, so as cross-examine her with regard to the "magnet effect" allegations made in her declaration. Judge Johnson expressed concern on the record that the Government appeared to be "stacking the deck," by including for the first time in a stay application before this Court a declaration that had not been subject to cross-examination. Accordingly, Judge Johnson directed the Government to inform this Court that the Hrinak Declaration had been generated for the first time on appeal and had not been part of the record before the District Court. Judge Johnson further advised respondents to move before this Court either to strike the Hrinak Declaration from the record or, in the alternative,

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[1] For example, the Solicitor General filed the affidavit of Admiral William P. Leahy, Jr. before the Supreme Court, affirming that having counsel from the Haitian Refugee Center present on Coast Guard cutters would interfere drastically with operations. Upon later deposition, Admiral Leahy testified that his own 14 year-old son had spent two weeks on a Coast Guard cutter during an operational law enforcement mission. Similarly, Assistant Secretary of State Bernard Aronson declared that he had "credible reports" that as many as 20,000 Haitians were "massing on one of Haiti's coasts preparing to depart by sea for the United States." In subsequent deposition, however, Aronson conceded that "massing" was "an ambiguous term," that they were not "gathered in some huge group," and that he could not be sure of how many there actually were. *See generally HRC v. Baker*, Plaintiffs' Application to Stay the Mandates of the United States Court of Appeals for the Eleventh Circuit Pending Certiorari at 31-41.

to supplement the record before this Court with a deposition of Ms. Hrinak or counter-declarations regarding the "so-called" magnet effect.

Accordingly, respondents hereby request that this Court take judicial notice of the attached "Chronology of Events in Haiti Since March 18, 1992," drawn from the wire services and newspaper accounts. *See* Appendix A. These events, which include the collapse of an international plan for returning President Aristide to Haiti and a new wave of violence and beatings by the Haitian military, are also recounted in the attached Declaration of Jocelyn McCalla of the National Center for Haitian Refugees, who has just returned from seven days in Haiti. *See* Appendix B. The events recounted in these appendices wholly rebut the Government's unfounded claim of irreparable injury from the District Court's order by providing ample reason, wholly unrelated to that order, why Haitians might have begun to flee Haiti in enlarged numbers in late March.

Now that the Court as a whole is considering the Government's stay application, respondents reiterate their request that that application be summarily denied, or that respondents be given an opportunity to file a responsive memorandum of law within twenty-four hours of the Court's call for a response. Respondents reiterate that the only issue raised by this stay is whether our clients—three legal service organizations and their Haitian clients, who are being held in custody, incommunicado, and against their will on territory subject to complete U.S. jurisdiction and control—will have an opportunity to talk to one another before the Second Circuit resolves the appeal.

Given that thirty-four credible asylum applicants will be sent back just as soon [as] Judge Johnson's order is stayed; that conditions in Haiti appear to be rapidly deteriorating; that respondent Haitian Service Organizations are suffering daily and irreparable injury to their First Amendment rights because the Government

denies them access to their clients; that no probative evidence has been offered regarding any magnet effect caused by Judge Johnson's order, that that order does not affect the Government's power to repatriate Haitians who have been "screened-out," *i.e.*, found not to have a credible fear of political persecution, or even "screened-in" (so long as they have been adequately counseled); that no *certiorari* petition is or will soon be pending before this Court; that the Second Circuit is already scheduled to hear an expedited appeal in this case in about two weeks; and that the Government's arguments against the order have already been rejected six successive times, without dissent, by two federal courts, respondents again respectfully urge this Court to deny the stay requested in this case.

Very truly yours,

/s/ Harold Hongju Koh
HAROLD HONGJU KOH
Council for Plaintiffs
Haitian Centers Council, Inc., et al.

Appendix A: Chronology of Recent Events in Haiti Since March 18, 1992

Appendix B: Declaration of Jocelyn McCalla

cc: The Honorable Sterling Johnson, Jr., EDNY
Scott Dunn, Esq., AUSA-EDNY
Ronald Mann, Esq., Solicitor General's Office, DOJ
John F. Daly, Esq., Civil Appellate, DOJ
Robert Bombaugh, Esq., OIL-DOJ

APPENDIX A

CHRONOLOGY OF EVENTS IN HAITI SINCE MARCH 18, 1992:

Compiled from Wire Services and Newspapers

• *March 18, 1992*: Haitian lawmakers shout, shove and brandish guns on the assembly floor during the legislative session in which they consider ratification of the agreement to return Aristide to power, which was sponsored by the Organization of the American States (OAS). Under pressure from military officers in support of the coup, the lawmakers fail to ratify the agreement.

> *See* Howard W. French, *Haiti Accord Is Set Back in Parliament*, N.Y. Times, March 20, 1992; Kenneth Freed, *Haiti Plan for Aristide's Return Just Barely Alive*, Los Angeles Times, March 20, 1992 at A40 ("At another point [during the parliamentary session], Deputy Josue LaFrance pulled a pistol from the waistband of his trousers during a confrontation with an unnamed foe, sending reporters in a nearby press gallery scurrying."); Luc Desmarins, *Haiti: Six Months On, Interim Regime Shows No Sign of Quitting*, Inter Press Service, March 27, 1992.

• *March 27, 1992*: The Haitian Supreme Court, surrounded by gunmen supporting coup leader Joseph Nerette, reject the OAS-sponsored agreement to return Aristide to power, ruling it unconstitutional.

> *See* Roosevelt Jean-Francois, *Haitian Lawmakers Call for Ratification of Washington Accord*, United Press International, April 6, 1992; *Haitian Court Rejects OAS-Backed Plan*, Chicago Tribune, March 29, 1992 at 24; Canute James, *Haiti Warns Aristide Supporters*, Financial Times, March 31, 1992 at 6 ("[C]ourt's ruling, following submissions by the army-backed government, and the subsequent threats to the legislators, has scuttled any hopes of an early return by Mr. Aristide, and has strengthened the hand of the army. . .")

• *March 28, 1992*: Haiti's military rulers threaten to arrest parliamentarians who try to ratify an agreement that would allow Aristide to return to the country.

> *See* Michael Tarr, *Haiti Government Threatens Lawmakers Who Defy Court with Arrest*, Reuters, March 29, 1992; Canute James, *Haiti Warns Aristide Supporters*, Financial Times Limited, March 31, 1992 at 6.

• *April 3, 1992*: Armed civilians and soldiers beat university students "who were about to begin a protest against the military-backed government." Soldiers used rifle butts to strike students and professors in the head and face, and kept approximately 100 students from leaving the campus for several hours.

> *See Haitian Military Blocks Student Protest*, Reuters, April 3, 1992.

• *April 5, 1992*: Members of the military, who are "moving through the street to cut down opponents and scatter would-be demonstrators with random gunfire," have "all but quieted Haiti's once vigorous press corps." Soldiers rampaged through studios, riddling them with bullets and destroying transmitters and antennas.

> *See* Howard W. French, *Crackdown Keeps Haiti Radio Silent*, New York Times, April 5, 1992 at 14.

• *April 6, 1992*: In several neighborhoods of Port au Prince, police violently disperse and beat protestors who demonstrated in order to show their support for Aristide and to call for the ratification of the OAS accord. Several people are arrested, including a young boy who was returning from school. A group of 50 Senators and deputies

urge the National Assembly speaker to call the legislature into session in order to allow them to ratify the accord.

See Protestors and Lawmakers Call for Ratification of Accord, Agence France Presse, April 6, 1992; *Haitian Government Breaks Up Protests*, Reuter Library Report, April 6, 1992; *Haiti:Pro-Aristide Demonstration Follows Visit by U.S. Official*, Inter Press Service, April 6, 1992.

• *April 8, 1992*: Radio Tropic, "one of the few independent stations still broadcasting news," and some university professors defend themselves against "what they termed false charges spread by the government-controlled Radio Nationale." Lucien Pardo, leader of the social democrat KONAKOM party, was detained by the military for several hours and soldiers surrounded the school he owned in Gonaives.

See Haitian Radio, Professors Defend Against Charges, Reuters, April 8, 1992.

Robert Gelbard, Principal Deputy Assistant Secretary of State for Inter-American Affairs, visits Haiti, and Haitian politicians who met with him state that "he had clearly implied that if a solution to the crisis was not found within the next five weeks, an invasion might be considered."

See Haitian Government Proposes "National Conference" on Crisis, Reuter Library Report, April 8, 1992.

• *April 9, 1992*: Haiti's interim government, led by coup leader Joseph Nerette, reiterates its opposition to the OAS accords and calls for a Haitian national conference to discuss Haiti's own solutions to its political crisis. Members of Parliament strongly object, depending the proposal as an attempt to delay resolution of the crisis and circumvent the OAS accord.

See Haiti: Parliamentarians Oppose Call for National Conference, Inter Press Service, April 9, 1992; *Haitian Government Proposes "National Conference" on Crisis*, Reuters, April 8, 1992.

Reuters reports that Radio Antilles journalist Paul Jean Mario, detained since November by the military, was reported to be "near death from being beaten and deprived of his medication needed to control bleeding from earlier beatings." Furthermore, Inter Press Service reports that "seven young people in Petionville . . . were arrested by the police, who accused them of planning a pro-Aristide demonstration" and that one of the youths "was wounded when police shot him in the feet."

See Haiti Government "Conference" Knocked; Reporter Feared Near Death, Reuters, April 9, 1992; *Haiti: Journalist Tortured as Selective Repression Continues*, Inter Press Service, April 8, 1992.

• *April 10, 1992*: During a pro-Aristide demonstration at a cathedral in Port-au-Prince, soldiers arrest at least ten students and beat them while forcing them into police trucks. Soldiers also arrest journalists from Radio Cacique, Agence France Presse, and Inferno magazine who were observing the demonstration and confiscated some equipment. Inter Press Service reports that these protests came "just a few hours after the military endorsed a call by Haiti's interim government for a national conference." A separate protest is staged at the University of Haiti.

See Soldiers Arrest Student Demonstrators, 3 Journalists, Reuters, April 10, 1992; *Haiti: Calls for Aristide's Return Become Louder*, Inter Press Service, April 10, 1992.

• *April 12, 1992:* Radio Tropic freelancer Sony Esteus is arrested and beaten at a mass at Saint Michel Church in Port au Prince. He is reported to be "in serious condi-

tion with broken bones." Soldiers also surrounded the church "to prevent anti-government demonstrations after the mass."

See Haiti Minister Resigns, Military Denies Beating Journalists, Reuter Library Report, April 14, 1992.

During a speech by interim President Nerette, Aristide supporters burn the Chamber of Commerce and a Catholic church in Port de Paix.

See Robin L. Wolfgang, Aristide Backers Burn Church During Haitian President's Speech, U.S. Newswire, April 13, 1992.

• *April 13, 1992:* Nerette's government cancels a rally in support of his reform proposals, which had been scheduled for April 14, 1992, because of threats of violence made by Aristide supporters.

See Robin L. Wolfgang, *Aristide Backers Burn Church During Haitian President's Speech*, U.S. Newswire, April 13, 1992.

Radio Tropic reports that the Haitian parliament "by general consensus" rejected the Nerette government's proposal for a national conference, and moved to revive the ratification process for the OAS accord.

See Haiti Interior Minister Resigns; Assembly Rejects National Conference Proposal, British Broadcasting Corporation, Summary of World Broadcasts, April 16, 1992.

• *April 14, 1992:* Haiti's interim premier, Jean-Jacques Honorat, reshuffles the Haitian cabinet, replacing seven out of 12 cabinet ministers. Nerette approves the reshuffling. Nerette and Honorat announce no new strategy to end Haiti's political crisis.

See Haiti's Provisional Premier Reshuffles Cabinet, Agence France Presse, April 15, 1992; *Haiti Seven New Ministers Appointed in Cabinet Reshuffle*, British Broadcasting Corporation, Summary of World Broadcasters, April 17, 1992.

• *April 15, 1992:* New cabinet officials are sworn in. Ceremonies are boycotted by parliamentary leaders, which OAS officials state is an indication that the majority in the parliament backed the OAS-sponsored agreement. Despite this sentiment in the parliament, Honorat announces at the ceremony that his government "will no longer sit to negotiate with any white."

See Haiti: Accord "Does Not Exist" Says Interim President, Inter Press Service, April 16, 1992; *Haiti's Prime Minister Denounces Negotiations with "Whites"*, Reuters, April 15, 1992.

Radio Tropic, one of the few remaining independent news sources in Haiti, ceases local news broadcasts because of increased threats to its staff. Information director Henri Alphonse goes into hiding.

See Haiti's Prime Minister Denounces Negotiations with "Whites", Reuters, April 15, 1992.

• *April 16, 1992:* Interim President Nerette describes the OAS accord as invalid and says it "does not exist." He also states that if Aristide returned to Haiti he would face trial for "crimes and felonies that he's been accused of."

See Haiti: Accord "Does Not Exist" Says Interim President, Inter Press Service, April 16, 1992; David Haskel, *U.S., OAS Accused of Racial Bias Against Haiti*, Reuter Library Report, April 16, 1992.

Noting that a "new wave of Haitian boat people" has fled Haiti, the Washington Post reports that "officials and advocates for the Haitians said an important factor was the collapse last month of a political agreement that would have returned to power ousted President Jean-Bertrand Aristide." A senior official is described as say-

ing: "When the Haitians felt things were going to improve . . . such as after the accords were signed, they stayed in Haiti. Now, they may feel there is no hope for a political solution, and they have begun leaving again . . ."

See Al Kamen, *Large Wave of Boat People Sails from Haiti*, Washington Post, April 16, 1992 at A6.

• *April 17, 1992:* On Good Friday, the military block a procession attempting to leave St. Gerard Church in Carrefour Feuilles, an area of Port au Prince where the military is unpopular. The military closely patrolled religious ceremonies.

See Haitian Military Stops Anti-Government Songs of Street Bands, Reuters, April 20, 1992.

• *April 18, 1992:* Radio Tropic resumes its local news reports despite threats to its staff. Its news director, however, remains in hiding.

See Haitian Military Stops Anti-Government Songs of Street Bands, Reuters, April 20, 1992.

• *April 20, 1992:* Over Easter weekend, Haitian soldiers break into a crowd of 2,000 street dancers celebrating in Port au Prince, arresting 15 people and beating many more. The dancers are members of religious bands whose songs often express pro-Aristide sentiments. Reuters reports that the intent of the soldiers' violence was to "stop any hint of criticism of the military-backed government," and that human rights activists said that "police were making examples of people in front of large crowds to deter any anti-government demonstrations." According to a Radio Tropic reporter who was himself detained overnight, there were also many beaten and arrested in the city of Jacmel.

See Haitian Military Stops Anti-Government Songs of Street Bands, Reuters, April 20, 1992.

APPENDIX B

DECLARATION OF JOCELYN McCALLA

1) I am the Executive Director of the National Coalition for Haitian Refugees. I routinely monitor human rights conditions in Haiti and I have written, contributed to and edited reports on such conditions over the past six years as part of efforts, ordinarily conducted jointly with Americas Watch, to promote compliance with internationally-sanctioned human rights standards in Haiti.

2) I have visited Haiti for a seven-day period from April 10 through April 17, 1992, with the goal of assessing political and human rights conditions in that country at this time.

3) In the course of my visit, I met with human rights monitors, lawyers representing persons arrested arbitrarily by Haitian military authorities, political leaders and representatives of the press. At the end of my visit I came to the conclusion that the two groups in the country that continue to be most at risk of military persecution, intimidation, illegal arrests, torture and other physical abuse, include the press and members of grassroots organizations. These organizations include but are not limited to church-affiliated groups, "gwoupman" or peasant cooperatives, farmers associations and other similar associations that are established primarily in rural areas.

4) Many independent radio stations in Haiti remain off the air for fear of retaliation from government security forces if they broadcast news that appears even remotely critical of the military regime. Those which do operate in Haiti practice self-censorship. During my visit Radio Tropic temporarily suspended broadcasting domestic news following threats made to the employees of this station. Its news director, Mr. Henri Alphonse, had to go into

hiding on April 14, 1992, because of fear of assassination based on direct threats made by a visiting military officer. To the best of my information and belief, he remains in hiding at this time. Two days earlier on April 12, a correspondent of Radio Tropic was arbitrarily arrested by a military patrol of around six soldiers following a church service that he was covering as a reporter. Both of his arms were broken during that arrest.

5) In the countryside, the Haitian military continues to maintain a tight grip on group activities, whether of an economic, social or political nature. Meetings continue to be prohibited by the military regime. Strict control of vehicular traffic to and from the countryside has been established. Passengers and the vehicles in which they are riding are routinely and thoroughly searched for materials critical of the military regime.

6) Religious gatherings are under constant surveillance because they provide a forum for people to meet and collectively discuss community affairs and activities. During Holy Week (April 12 through April 19), many Easter celebrations featuring traditional group singing and dancing in the streets were attacked by military units that arrested and physically abused several participants because their religious chants were ruled threatening to the military regime. Military-sponsored political violence in the countryside remains as widespread today as the days immediately following the September 1991 Coup. Consequently, the risk of persecution and of being killed by military personnel who enjoy immunity from prosecution constitutes a grave danger to the Haitians.

7) Members of the National Coalition for Haitian Refugees have spoken with Haitian refugees on a daily basis regarding their motivations for leaving Haiti and from these conversations it is clear that these internal, political factors—not some so-called "magnet effect" from U.S.

court orders—weigh decisively in the determination of Haitians to risk their lives at sea and seek safety outside the border of their own country. To claim otherwise is to consciously ignore the reality of oppression and repression which daily plagues the lives of ordinary Haitians.

I declare under penalty of perjury that the foregoing is true and correct.

This 22nd day of April, 1992

JOCELYN MCCALLA *

New Haven

* Original has been signed and shall be submitted to the Court upon receipt.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

(Title Omitted in Printing)

TRANSCRIPT OF TELEPHONE CONFERENCE CALL BEFORE THE HONORABLE STERLING JOHNSON, JR. UNITED STATES DISTRICT JUDGE

* * * * *

[2] THE COURT: Hello.

Also present in my office is Scott Dunn, Bob Bergliter, Tawana, Gail, Betsy, a court reporter.

Go ahead.

MR. CAPPUCCIO: I'm not sure what the call is about except that I sent a letter today.

THE COURT: I am in receipt of the letter and Mr. Koh hadn't gotten a copy of the letter, and I think we faxed him a copy.

Have you read the letter, Mr. Koh?

MR. KOH: Yes. I actually had some comment to make.

* * * * *

[5] By then, there happened to be a boat leaving that day, and I don't know what systems, to be honest with you, the military uses for determining exactly who is going on the boat, but it obviously has to be people who are screened-out.

But in the have-to-do-this, these people who were initially screened-out were screened-in—were put on the boat because the military was not aware that the reversal had been made or perhaps the reversal hasn't been made yet.

THE COURT: You say a reversal had been made but not communicated, is that it?

MR. CAPPUCCIO: I don't know which of the two it is, your Honor.

THE COURT: Okay.

MR. CAPPUCCIO: I am trying to find that out. Whatever the problem was, it is simply intolerable that people are being put on a boat before it is definitively determined that they have gone through quality review.

This is an unacceptable lack of communication between the military that is—you know, the military is very operational and very efficient—and the INS, which has their procedures and their time frame to do quality review.

About the only thing I can tell you is that my boss, the Attorney General, and his colleagues, Secretary of Defense, has to tell these people, and they are, that there is [6] no way that doing this efficiently can be done at the cost of a mistake like this being made. We have to be sure.

If we are going to have the second level of review for benefit of the doubt, which I think is a good and generous thing, we have to be damned sure that people have gone through it before we load people on a boat. That is my understanding the first incident.

I understand it may have occurred on a separate occasion on Monday, but my understanding was those people were never returned to Haiti. They were on the boat but they were brought back to the United States.

I don't know if that is the most current information. I can't represent that as 100 percent true but that is what I know so far.

THE COURT: Can you tell me who is in charge of that operation down there?

MR. CAPPUCCIO: In Gitmo.

THE COURT: Yes.

MR. CAPPUCCIO: General Wal—

THE COURT: Not the military, but the person responsible for screening in/screening out or particularly screening in and making sure the people are not repatriated to Haiti once they have been screened-in.

MR. CAPPUCCIO: The problem is, it is a joint task force. That's what JTF is.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

(Title Omitted in Printing)

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE STERLING JOHNSON, JR.,
UNITED STATES DISTRICT JUDGE

* * * * *

[61] * * * I recall the argument that was made because of my injunction there would be magnet effect and when this case went up to the Supreme Court and they lifted the stay people kept coming in droves. In fact, more people came after the stay was lifted than came before.

MR. STARR: Your Honor, we may agree to this degree, that I believe that just the pendency of litigation based on affidavits that we have filed both in the district court in the Southern District of Florida, in the 11th circuit, based upon our experts that the tendency of litigation has, in fact, had a magnet effect. We have never said and I want to be very clear about this, that there are not other factors. This is an enormously complicated and an unhappy and tragic situation. Obviously sanctions are being imposed.

May I say just a word about the sanctions? This is why—this is a position of the Organization of the American States. United Nations has essentially looked to the OAS not to the United States, but to the OAS. We are a member of the OAS. The OAS has determined that the appropriate policy, and this is a policy by consensus, at this time is an embargo.

There is no question I think in one's mind that deteriorating economic conditions can produce an outflow because of the hardships caused by an embargo. * * * *

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Professor of Law
(203) 432-4932
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BY FAX

April 28, 1992

The Honorable Sterling Johnson, Jr.
U.S. District Court
Eastern District of New York
225 Cadman Plaza
Brooklyn, NY 11201

Re: No. 92-1258, *Haitian Centers Council Inc. v. McNary*

Dear Judge Johnson:

We file this letter only with reluctance, and based upon the most troubling and disturbing news. Based upon information received last night, we now have reason to believe: first, that if you do not immediately rule on our request for an injunction pending the appeal under Rule 62(c) of the Federal Rules of Civil Procedure, our case may very well be moot before we appear before the Second Circuit on May 8; and second, that defendants' mistreatment of Haitians on Guantanamo is proceeding at a scale even beyond our previous fears.

Last night a Catholic priest who had been on Guantanamo until yesterday contacted us with the information contained in the attached declaration: that since the Supreme Court granted its stay last Wednesday, U.S. officials have reinterviewed and repatriated 57 HIV-positive Haitian plaintiffs, will likely repatriate a further 102 plaintiffs today, and by May 8 (the date the Court of Appeals is scheduled to hear the appeal in this case), will likely send all HIV-positive plaintiffs, and perhaps all screened-in plaintiffs, out of Guantanamo.

The group of 102 (names attached) that is scheduled to return today has repeatedly and vociferously protested their pending uncounseled repatriation. That group includes two of our named plaintiffs, Dr. Frantz Guerrier (Declaration at P.E. 45) and Milot Baptiste (Declaration at P.E. 66), as well as five other individuals who retained us as counsel and were interviewed by our team when they visited Guantanamo under your order at the end of March: Chery Martin (Declaration at P.E. 59), Soinel Joseph (Declaration at P.E. 41), Examine Pierre (Declaration at P.E. 58), Wiguens Constant, and Jean-Pierre Dieuseul (Declaration at P.E. 71). These individuals are among the most politically active Haitians at Guantanamo —a fact that virtually ensures that they will face torture or death if returned to Haiti. Moreover, they are being repatriated based solely on the fact that they insist on their legal right to a fair determination, with counsel, of their refugee status. Defendants emphatically have *not* reached any determination of the strength of these plaintiffs' claims to asylum.

The priest overheard American military authorities planning to use force, if necessary, to compel these plaintiffs to return. In addition, the priest personally witnessed, and unsuccessfully tried to stop, American MP's in riot gear severely beating a Haitian refugee, breaking open his skull. *See* paragraph 7 of Fabre Declaration.

This information shocks the conscience. Based upon this information, and that previously submitted to the Court, we most urgently renew our request that you grant our request for an injunction pending appeal temporarily blocking the rescreening and repatriation of any screened-in plaintiffs, which is still pending before you. We do not request access at this time to these plaintiffs, merely that you spare them from immediate and irreparable injury pending disposition of the appeal before the Court of Appeals.

We return to you with this request not to burden you, or out of any disrespect for your past rulings. Your

April 27, 1992 order reserving judgment on our TRO request did not pass on our separate request for an injunction during the pendency of the appeal under Fed. R.Civ.Pro. Rule 62(c) to preserve this Court's jurisdiction pending the appeal. *See* page 2 of our application. As the above facts show, with each passing hour, the likelihood dramatically increases that, by the time the Second Circuit rules on the pending appeal of your Preliminary Injunction, plaintiffs case will be moot and this Court will have lost jurisdiction over not only the issues that are currently on appeal, but also every other legal claim made by plaintiffs (including the four on which you have expressly reserved judgment). We return to you with this request simply because if you do not rule, we may have no case left by the time we appear before the Second Circuit and our clients may have been irreparably brutalized.

We reemphasize that the Supreme Court's stay, issued on April 22, 1992, stays *only* the injunctive relief that you have entered on First Amendment and Fifth Amendment Due Process grounds. This Court retains full authority and jurisdiction to issue relief on any other grounds, particularly when such relief is necessary to preserve this Court's jurisdiction over the case. Indeed, it is entirely appropriate for a district court to enter limited, temporary injunctive relief while an appeal is pending "when it is necessary to preserve the status quo," *Kidder v. Maxus*, 925 F.2d 556, 565 (2d Cir. 1991). If you do not now rule, defendants may brutalize and repatriate all of our clients, simply leaving no case to be argued to the Second Circuit.

Sincerely,

/s/ Harold Hongju Koh
HAROLD HONGJU KOH
Counsel for the Plaintiffs,
Haitian Centers Council, Inc., et al.

Attachments

ATTACHMENT A

DECLARATION OF FATHER JACQUES FABRE

1. My name is Father Jacques Fabre, and I am a priest in the Society of St. Charles. I have been a missionary for refugees and migrants assigned to Guantanamo Bay. The Society's base is the Provincial House of the Society of St. Charles in Greenwich Village, New York City. I am fluent in English and Creole, and from December 24, 1991 until April 27, 1992 I served at the U.S. military base on Guantanamo Bay, Cuba, administering to the thousands of Haitian refugees there. Except for a one week trip to the U.S. in early February, I remained on the base for the entire period.

2. On Thursday, April 23, the day after the Supreme Court decision, all asylum officers at Guantanamo Bay were brought to Camp Bulkeley to begin immediate re-interviewing of the 300 refugees held there. According to INS officials, all refugees in Bulkeley are HIV positive or the children of HIV positive people.

3. On Friday, April 24, the authorities began repeated broadcasts in Camp Bulkeley. In menacing language, refugees were told that they had 24 hours to submit to a second interview, or else the American authorities could not be responsible for the consequences. The clear threat of the message was that refugees who did not consent to a second interview would be repatriated immediately. In response, members of the Association of Haitian Political Refugees (AHPR), insisted that a second interview could only be conducted in Miami or with their lawyers. AHPR pointed out that the Justice Department lawyers were present, but their own lawyers were not. An increased military presence around the camp added to the pressure, but members of AHPR resolved to stick together even if it meant dying together.

4. That same day, Friday, April 24, the government repatriated 27 refugees from Camp Bulkeley after they had signed some sort of waiver form. Some of these

refugees were among the 65 people who had been screened in and then re-interviewed, but they were not informed of the results before deciding whether to submit to repatriation.

5. On Saturday, April 25, 30 more refugees in Bulkeley were repatriated, though again, some had already had second interviews and may have been chosen to go to Miami.

6. As the repatriations continued, I sensed growing tension among the refugees and officials. On Sunday, April 26, when I visited Camp 7 to say goodbye to refugees there, I heard a refugee shouting that he was supposed to be in the prison seven days, but his sentence had been extended an additional seven days. Military Police (MPs) in riot gear went in and began to beat the man. I shouted at the MPs that he was surrendering and to stop beating him. The MPs wouldn't stop, and I threw my body between the Americans and the Haitian. The MPs pulled me away, wrenching my arm. They threw the Haitian to ground, cracking open his skull, and continued to beat him. There was blood everywhere.

7. The INS is preparing to repatriate the 102 members of AHPR at the first chance they get. They will likely repatriate them today, Tuesday, April 28. I overheard military authorities say that they planned to use force to remove these 102 people because they expect the Haitians to resist. The members of AHPR are some of the most articulate and politically active people in Bulkeley, and many, such as AHPR officers Dr. Franz Guerrier and Chery Martin, were leaders in Aristide's Lavalas movement.

8. Some "triple-backers" are now arriving on Guantanamo. I recently spoke to one, a political activist who had fled Haiti twice previously, been picked up at sea, detained, and twice repatriated, only to find that the military authorities continue to brutalize the Haitian people, and that violence pervades the nation.

9. At the current rate of repatriation, the INS will empty Camp Bulkeley well in advance of May 8, when I understand the Court of Appeals will consider this case. Camp Bulkeley holds all refugees identified by the INS as HIV positive.

I swear upon penalty of perjury that the foregoing is true and correct to the best of my knowledge.

/s/ Jacques Fabre
JACQUES FABRE

4-28-92
Date

PROPOSED INTERDICTION OF HAITIAN FLAG VESSELS

Proposed executive agreement between the government of Haiti and the United States, by which the U.S. Coast Guard is to stop and board Haitian flag vessels on the high seas in order to prevent Haitians from entering the United States illegally, is authorized both by the U.S. immigration laws, and by the President's inherent constitutional power to protect the Nation and to conduct foreign relations.

Authority for provision in proposed agreement with Haiti, by which the Coast Guard will detain Haitians emigrating in violation of Haitian law and return them to Haiti, derives from the President's statutory power to guard the borders against illegal entry of aliens, and from his inherent constitutional power in the field of foreign relations.

August 11, 1981

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

This responds to your inquiry concerning the implementation of the proposed interdiction of Haitian flag vessels. As presently formulated, the government of Haiti and the United States will enter into an agreement (the Agreement) permitting the United States Coast Guard to stop Haitian flag vessels, board them and ascertain whether any of the Haitians aboard have left Haiti in violation of its travel laws and whether they intend to travel to the United States in violation of U.S. immigration laws. Individuals who are determined to have left Haiti illegally will be returned to Haiti pursuant to the President's authority in the field of foreign relations in order to assist Haiti in the enforcement of its emigration laws. Those who have left Haiti, whether legally or illegally, in an attempt to enter the United

States illegally will be returned to Haiti pursuant to the President's authority under 8 U.S.C. §§ 1182(f) and 1185(a)(1) to enforce U.S. immigration laws, to protect our sovereignty, and as an exercise of his power in the field of foreign relations.[1]

The Coast Guard plans to intercept the Haitian vessels in the Windward Passage, on the high seas but relatively close to Haiti.[2] At that point, Haitians will be headed toward either the United States or the Bahamas. Although experience suggests that two-thirds of the vessels are headed toward the United States, it is probable that, as the interdiction continues, an ever-increasing number will claim they are going to the Bahamas. Unless the Haitians admit they are coming to the United States, establishing their intended destination may become more difficult.

1. *Effect of the Immigration and Nationality Act (INA).* The interdiction will not be affected by the provisions of the INA. Aliens are entitled to exclusion proceedings only when they arrive "by water or by air at any port within the United States." 8 U.S.C. § 1221(a). They are entitled to deportation proceedings only if they are "within the United States." 8 U.S.C. § 1251. Asylum claims may only be filed by those "physically present in the United States or at a land border or port of entry." The Refugee Act of 1980, Pub. L. No. 96-212, § 201(b), 94 Stat. 105 (to be codified at 8 U.S.C. § 1158(a)). Since the interdiction will be taking place on the high

[1] We note that the Agreement does not cover United States vessels either while they are in Haitian waters or while they are on the high seas. Therefore, the Agreement does not contemplate the return of the Haitians on board such vessels to Haiti.

[2] Placing the Coast Guard vessels closer to the United States is apparently not possible because of the increased difficulties and costs of detecting and interdicting vessels from Haiti once they have traveled far from Haiti and the practical problems of caring for the Haitians during the 4-day voyage back to Haiti.

seas, which is not part of the United States, 8 U.S.C. § 1101(a)(38), none of these provisions will apply.

2. *Coast Guard Authority to Enforce United States Laws.* The Coast Guard is authorized to stop ships upon the high seas in order to detect violations of American laws. 14 U.S.C. § 89(a).[3] The interdiction at seas of a foreign flag vessel requires the permission of the flag state, which the contemplated Agreement expressly grants.[4] The authority for returning the Haitians who are attempting to enter the United States illegally may be found in both statutory authority and implied consti-

[3] This section states:

> The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas . . . for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance. When from such inquiries, examination, inspection, or search it appears that a breach of the laws of the United States rendering a person liable to arrest is being, or has been committed, by any person, such person shall be arrested or, if escaping to shore, shall be immediately pursued and arrested on shore, or other lawful and appropriate action shall be taken; or, if it shall appear that a breach of the laws of the United States has been committed so as to render such vessel, or the merchandise, or any part thereof, on board of, or brought into the United States by, such vessel, liable to forfeiture, or so as to render such vessel liable to a fine or penalty and if necessary to secure such fine or penalty, such vessel or such merchandise, or both, shall be seized.

[4] The continuing jurisdiction of a country over vessels flying its flag on the high seas is a basic principle of international law. 1 L. Oppenheim, International Law § 264 (8th ed. 1955). This principle has been codified in the Convention on the High Seas, Apr. 29, 1958, art. 6, 13 U.S.T. 2313, T.I.A.S. No. 5200. Ships flying no flag may also be stopped to determine if they are stateless.

tutional authority under Article II. The two statutes are 8 U.S.C. §§ 1182(f) and 1185(a)(1). The first, 8 U.S.C. § 1182(f), states:

> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or non-immigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.[5]

The second, 8 U.S.C. § 1185(a)(1), provides:

> (a) Until otherwise ordered by the President or Congress, it shall be unlawful—
>
> > (1) for any alien to . . . attempt to . . . enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe . . .

Under § 1182(f), the President would make a finding that the entry of all Haitians without proper documentation is detrimental to the interests of the United States and issue a proclamation suspending their entry. It could be argued that the entry of illegal aliens, Haitians or otherwise, is already "suspended" since it is already illegal for them to come, and that the section is directed against those who are otherwise eligible. The section, however, is not limited by its terms to documented aliens, and the legislative history is silent on this point. Since the section delegates to the President the authority to exclude entirely certain classes of aliens, we believe that

[5] Neither this Office nor the Immigration and Naturalization Service (INS) is aware of any time when the power granted by this section, added in 1952, has been used.

a return of the Haitians can be based on the Coast Guard's power to enforce federal laws. 14 U.S.C. § 89(a). Likewise, § 1185(a)(1) makes it unlawful for any alien to enter the country unless in compliance with the rules and limitations set by the President. All of the undocumented Haitians who are attempting to enter the country are therefore doing so in violation of this section. *See also* 8 U.S.C. § 1103 (Attorney General's duty to control and guard the borders); *Ex parte Siebold*, 100 U.S. 371, 396 (1879).[6]

Implied constitutional power is less clear. Where Congress has acted, the regulation of immigration is an area in which Congress exercises plenary power. *Kleindienst* v. *Mandel*, 408 U.S. 753, 766 (1972) (power to exclude aliens prevails over First Amendment interests of citizens). There has been recognition, however, that the sovereignty of the Nation, which is the basis of our ability to exclude all aliens, is lodged in both political branches of the government. *See Ekiu* v. *United States*, 142 U.S. 651, 659 (1892). An explicit discussion is found in *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537 (1950). Rejecting a claim that it should review regulations which excluded a German war bride, the Court stated:

> Petitioner contends that the 1941 Act and the regulations thereunder are void to the extent that they contain unconstitutional delegations of legislative power. But there is no question of inappropriate delegation of legislative power involved here. The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is *inherent in the executive power* to control the foreign affairs of the nation.

[6] Given the desperate physical condition of many of the Haitians found on the high seas, the Coast Guard may, in particular situations, also be acting pursuant to its duty to render aid to distressed persons and vessels. 14 U.S.C. §§ 2, 88.

> *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304; *Fong Yue Ting* v. *United States*, 149 U.S. 698, 713. When Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power. It is implementing an inherent executive power.

Id. at 542 (citations omitted, emphasis added). *See also Savelis* v. *Vlachos*, 137 F. Supp. 389, 395 (E.D. Va. 1955) *aff'd*, 248 F.2d 729 (4th Cir. 1957) (dictum).

The President, in the exercise of this inherent authority, would be acting to protect the United States from massive illegal immigration. His power to protect the Nation or American citizens or property that are threatened, even where there is no express statute for him to execute, was recognized in *In re Neagle*, 135 U.S. 1, 63-67 (1890). *See also In re Debs*, 158 U.S. 564, 581 (1895); *United States ex rel. Martinez-Angosto* v. *Mason*, 344 F.2d 673, 688 (2d Cir. 1965) (Friendly, J. concurring); 50 U.S.C. § 1541 (War Powers Resolution).[7] A recent Supreme Court decision points out that, in the absence of legislation, it was a common perception that the President could control the issuance of passports to citizens, citing the foreign relations power. *Haig* v. *Agee*, 453 U.S. 281, 292-94 (1981).

The President may also act to return the boats with the flag state's permission as an exercise of his power in the field of foreign relations, a field in which "with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation." *United States* v. *Curtiss-*

[7] This Office has relied upon such inherent authority in an opinion, stating that the President could act to prevent airplane hijackings by placing marshals on board, even in the absence of express authority to take such preventive measures. Memorandum for the Director, United States Marshals Service, from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, 2-3 (Sept. 30, 1970).

Wright Export Corp., 299 U.S. 304, 319 (1936). *See also Narenji* v. *Civiletti*, 617 F.2d 745, 747-48 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 957 (1980) (regulation of Iranian students); *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103 (1948) (regulation of foreign airlines). The President's power is strongest where he has well recognized constitutional powers (foreign affairs) to which Congress has added statutory delegation (8 U.S.C. §§ 1182(f), 1185).

3. *Coast Guard Authority to Enforce Haitian Law Pursuant to an Agreement Entered into by the Executive.* The Coast Guard has submitted a draft Agreement that would permit the Coast Guard to board Haitian vessels in order to determine whether any alien is committing an offense against Haitian emigration laws. The issue which arises is whether the Executive can enter into an agreement under which the United States agrees to detain Haitians who are emigrating in violation of Haitian law in order to return them to Haiti. The President's authority to enter into executive agreements with foreign nations may be exercised either under congressional authorization or the President's inherent authority.[8] The President's power to enter into such agreements on his own authority can arise from "that control of foreign relations which the Constitution vests in the President as a part of the Executive function," 39 Op. Att'y Gen. 484, 486 (1940).[9] The limits on presidential power to enter into these agreements are not settled and have aroused controversy from the earliest days of our Republic.[10]

[8] E. Corwin, The President's Control of Foreign Relations 116-17 (1917) (Corwin).

[9] Agreements executed by various Presidents for the settlement of claims of United States citizens against foreign governments are examples. *See Dames & Moore* v. *Regan*, 453 U.S. 654 (1981).

[10] E. Corwin, The President, 216-233 (3d ed. 1948) (debate between Hamilton and Madison over the constitutionality of Wash-

We believe that authority to enter into the Agreement is provided by two sources—the power delegated by Congress to the President, through the Attorney General, to guard the borders, 8 U.S.C. § 1103(a), and the President's authority in the field of foreign relations. The arrest of Haitian citizens as an aid to Haiti's enforcement of its emigration laws will enable the President to curtail the flow of Haitians in the furtherance of his "power and duty to control and guard the boundaries and the borders of the United States against the illegal entry of aliens." *Id.* The breadth of the President's authority in the field of foreign relations is extremely broad, as illustrated by the numerous executive agreements that have been negotiated and upheld by the courts.[11] *See United States* v. *Pink*, 315 U.S. 203 (1942) (Litvinov Agreement); *United States* v. *Belmont*, 301 U.S. 324 (1937) (same); *Tucker* v. *Alexandroff*, 183 U.S. 424, 435 (1902) (Mexican/United States agreement to permit both countries to cross the border in pursuit of marauding Indians);[12] *Dole* v. *Carter*, 444 F. Supp. 1065, 1068-69 (D. Kansas), *motion denied*, 569 F.2d 1109 (10th Cir. 1977) (return of the Crown of St. Stephen).

An agreement to aid the enforcement of the laws of another country is not without precedence. In 1891, the United States and Great Britain entered into an executive agreement prohibiting for one year the killing of seals in the Bering Sea. *Modus Vivendi Respecting the Fur-Seal Fisheries in Behring Sea*, 1 W. Malloy, Treaties, Conventions, International Acts, Protocols, and Agreements, 743 (1910) (Malloy). This agreement permitted the seizure of offending vessels and persons if "outside the ordinary territorial limits of the United States," by the naval authorities of either country. *Id.*, Art. III. "They shall be handed over as soon as practicable to the authorities of the nation to which they respectively belong. . . ." *Id.* As there was no statutory authority for this agreement, the President acted pursuant to his inherent authority in the field of foreign affairs.

Between 1905 and 1911, Presidents Roosevelt and Taft entered into a series of executive agreements that permitted the United States to operate the customs administration of both Santo Domingo (now the Dominican Republic) and Liberia.[13]

> [This first agreement] provided, in brief, for (1) a receiver of 'the revenues of all the customs houses,' to be designated by the President of the United States and satisfactory to the Dominican President; (2) the deposit in a New York bank for the benefit of creditors of all receipts above 45 percent, which was to be turned over to the Dominican Republic for the expenses of government administration and the necessary expenses of collection; and (3) the eventual distribution of the funds in the payment of Dominican debts.

W. McClure, International Executive Agreements 94 (1941). A customs administration in Haiti was established by treaty in 1915 but an elaborate series of executive agreements were signed "both extending and terminating various phases of American intervention and

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ington's Proclamation of Neutrality); L. Henkin, Foreign Affairs and the Constitution 177 (1972) (Henkin).

[11] Henkin, *supra*, at 179.

[12] 1 W. Malloy, Treaties, Conventions, International Acts, Protocols, and Agreements 1144 (1910) (Malloy).

[13] 1 W. Malloy, *supra*, at 418. *See also* McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements*, 54 Yale L.J. 181, 279 (1945); N. Small, Some Presidential Interpretations of the Presidency, 78-79 (1970). The arrangement was based on a fear that these countries' debts would be used by European countries as a grounds for military intervention.

assistance in the financial, medical and military affairs of Haiti." [14]

Many authorities have noted that a President's exercise of his authority in this area is "a problem of practical statemanship rather than of Constitutional Law." E. Corwin, The President's Control of Foreign Relations 120-21 (1917).[15] The Supreme Court has upheld a variety of executive agreements based upon a number of theories and it is difficult to delineate with certainty the limits of the President's authority when he enters into such agreements based solely on his inherent executive authority. *But see Reid* v. *Covert*, 354 U.S. 1, 16-19 (1957) (agreement cannot deny civilian his right to a trial by jury). Because this agreement will be based both on delegated and inherent authority, we believe that it is constitutional.

4. *Obligations Under the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, United Nations, Protocol, 19 U.S.T. 6223*, T.I.A.S. No. 6577. Article 33 (19 U.S.T 6276) of the Protocol, to which the United States is a party, provides that "No Contracting State shall . . . return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." Individuals who claim that they will be persecuted for one of these reasons must be

[14] McDougal, *supra*, 54 Yale L.J. at 279. The final one was signed in 1934.

[15] Commitment of financial resources overseas "depend[s] directly and immediately on appropriations from Congress. . . . While the issue of Presidential power to make executive agreements or commitments has no legal solution, political forces have mitigated its theoretical rigors. The President has to get along with Congress and with the Senate in particular, and he will not lightly risk antagonizing it by disregarding what it believes are its constitutional prerogatives." Henkin, *supra*, at 183-84. *See also* K. Holloway, Modern Trends in Treaty Law 216-17 (1967); McClure, *supra*, at 330; Restatement (Second) of the Foreign Relations Law of the United States § 121 (1965).

given an opportunity to substantiate their claims. The Protocol does not, however, mandate any particular kind of procedure. We have reviewed the plan outlined in the draft prepared by INS and believe that it comports with the Protocol.

5. *Effect of the Foreign Assistance Act of 1961, 22 U.S.C. § 2151-2151d (Supp. III 1979).* We know of no provision of the Act that would prohibit the interdiction, since no foreign aid funds are being used.

6. *Formal Implementation of the Interdiction.* There are three formal steps still to be taken before the interdiction can begin. The first is clearance of the Agreement by the Department of State. The second is the signing of the Agreement by the United States and the government of Haiti.[16] The third is the issuance of a proclamation by the President pursuant to 8 U.S.C. § 1182(f). The proclamation would contain a finding that the entry of Haitian nationals who do not possess proper documentation for entry into the United States is detrimental to the interests of the United States. The proclamation would then suspend the entry of all such Haitian nationals. If a decision is made not to rely upon 8 U.S.C. § 1182(f), no proclamation is necessary. However, the validity of the President's action will certainly be strengthened by relying on both statutory provisions which provide support for the contemplated action.

The Coast Guard is presently under the authority of the Department of Transportation. 14 U.S.C. § 1. The Attorney General is in charge of enforcing the immigration laws. 8 U.S.C. § 1103. The Coast Guard will be enforcing both the immigration laws and the laws of Haiti pursuant to the Agreement. While a memorandum of understanding signed by the Coast Guard, INS, and the Department of State would facilitate operations, 14 U.S.C.

[16] The Agreement should be transmitted to Congress within 60 days. 1 U.S.C. § 112b(a) (Supp. III 1979).

§ 141, a presidential order to the Secretary of Transportation to have the Coast Guard act to enforce both parts of the Agreement will avoid any question about the Coast Guard's authority to act.

7. *Coast Guard's Authority to Operate in Haitian Waters:* Under the Agreement Haiti will grant the Coast Guard permission to enter its waters to return Haitian nationals. The Coast Guard's authority to enter the waters will be pursuant to the Agreement.[17] By permitting the Coast Guard to enter its waters, Haiti is granting free passage to our ships and crews. Sovereign nations often grant permission for the passage of foreign forces. *Tucker* v. *Alexandroff*, 183 U.S. 424, 435 (1902); *Schooner Exchange* v. *McFaddon*, 11 U.S. 116, 139-40 (1812); 2 J. Moore, A Digest of International Law § 213 (1906). We suggest a modification to the Agreement to make it clear that Haiti will not exercise jurisdiction over the Coast Guard ships or her crews while they are in Haitian waters. *Schooner Exchange*, 11 U.S. at 140, 143.

THEODORE B. OLSON
Assistant Attorney General
Office of Legal Counsel

[17] It will not be pursuant to 14 U.S.C. § 89(a) because the waters of Haiti are not within the jurisdiction of the United States. *United States* v. *Conroy*, 589 F.2d 1258, 1265 (5th Cir. 1979). Section 89(a), however, does not limit the authority of the Coast Guard to act pursuant to another provision of law—in this case, the Agreement. 14 U.S.C. § 89(c).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

(Title Omitted in Printing)

AFFIRMATION OF HAROLD HONGJU KOH IN SUPPORT OF PLAINTIFFS' ORDER TO SHOW CAUSE WHY A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION SHOULD NOT BE GRANTED

Harold Hongju Koh, under penalty of perjury, hereby affirms:

1. I am one of the attorneys for the plaintiffs in the above-entitled case and make this affirmation in support of plaintiffs' order to show cause why a temporary restraining order (TRO) and preliminary injunction should not be granted.

2. Plaintiffs seek an emergency TRO based on legal grounds not yet ruled upon by any court and based on facts warranting immediate judicial relief.

3. Article 33 of the United Nations Protocol Relating to the Status of Refugees, 606 U.N.T.S., 19 U.S.T. 6223, T.I.A.S. No. 6577, which became United States law upon ratification on November 1, 1968, provides that "No Contracting State shall expel or return (*"refouler"*) a refugee *in any manner whatsoever* to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion" (emphasis added).

4. In 1980, Congress reaffirmed that self-executing obligation by enacting 8 U.S.C. § 1253(h)(1) Appendix F, which mandates that the "Attorney General shall not deport *or return* any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened on account of his race, religion, nationality,

membership in a particular social group, or political opinion" (emphasis added).

5. In the U.S.-Haiti Executive Agreement, T.I.A.S. 10,241, signed on September 23, 1981, the Government of Haiti "agree[d] to permit upon prior notification the return of detained vessels and persons to a Haitian port," but did so "[h]aving regard to . . . the international obligations mandated in the Protocol Relating to the Status of Refugees done at New York 31 January 1967 . . ." and on the express understanding "that under these arrangements the United States Government does not intend to return to Haiti *any* Haitian migrants whom the United States authorities determine to qualify for refugee status" (emphasis added).

6. These binding legal obligations compelled President Reagan to include in Executive Order No. 12,324, 46 Fed. Reg. 48,109 (Sept. 29, 1981), reprinted in 8 U.S.C.A. § 1182 Note (1982) Appendix B, at

> a) Sections 2(c)(3), which requires "that no person who is a refugee will be returned [to Haiti by the Coast Guard] without his consent," and
>
> b) Section 3, which mandates that the "Attorney General shall, in consultaton with the Secretary of State and the Secretary of the Department in which the Coast Guard is operating, take whatever steps are necessary to ensure the fair enforcement of our laws relating to immigration . . . and the *strict observance of our international obligations concerning those who genuinely flee persecution in their homeland.*" Sec. 3 (emphasis added).

That Executive Order by its own terms applied "only outside the territorial waters of the United States," demonstrating the applicability of Article 33 of the Protocol to the high seas by the Executive's own admission.

Only one month before that Executive Order issued, the Justice Department's own legal counsel construed our

obligations under the 1967 U.N. Protocol Relating to the Status of Refugees as requiring that "[i]ndividuals who claim that they will be persecuted . . . *must be given an opportunity to substantiate their claims.*" 5 Op. Off. Legal Counsel 242, 248 (1981) (emphasis added). (Appendix I)

7. Invoking presidential authority and sections 212(f) and 215(a)(1) of the INA, Appendix D and Appendix E, respectively, the Order issued on May 24, 1992 (May 24th Order) simply dispensed with these binding legal obligations, instead purporting:

> (a) to authorize defendants Coast Guard Commandants and INS summarily and forcibly return *bona fide* refugees without any semblance of process to conditions of persecution and death in Haiti, sec. 3;
>
> (b) to grant defendant Attorney General unreviewable discretion to deny Haitians access to the U.S. asylum program, without any "screening" procedures whatsover, sec. 2(c)(3); and
>
> (c) to revoke and replace Executive Order No. 12,324, sec. 4.

8. Citing the May 24th Order, defendants are currently interdicting and repatriating Haitians to Haiti without any screening whatsoever, in total disregard of their fears of political persecution. Defendants repatriated 38 Haitians on May 26, under this new, lawless policy. Prior to the May 24th Order, defendants were screening in over 30% of all interdicted Haitians for asylum assessments, most eventually in the United States. Deposition of Scott Busby, P.E. 88. As a result of the new Order, no Haitians are now being screened in, and hundreds if not thousands of Haitians who genuinely fear persecution in Haiti are being and will be returned.

9. In its preliminary injunction opinion of April 6, 1992, at 31, this Court certified under Fed. R. Civ. P.

23(b)(2) the class of screened-in plaintiffs, a class that includes "[a]ll Haitian citizens who have been or *will be* '*screened-in*'" (emphasis added). This Court further found that those Haitian refugees with a "'credible' fear" of persecution upon return are screened-in. PI Op. at 8. It is as yet unclear whether defendants will read the Executitve Order to allow them to repatriate, without screening, those several thousand currently unscreened Haitians being held on Guantanamo, including all those among them who in fact have credible fears of persecution.

10. During the court-ordered visit of plaintiffs' counsel to Guantanamo on March 30-31, 1992, pursuant to the TRO of March 27, plaintiffs' counsel met and counseled two particular screened-in clients, one of them a named plaintiff identified for his own safety by the pseudonym "M. Bertrand," who were subsequently repatriated to Haiti despite having been screened in. As the attached declarations of Ronald Aubourg, P.E. 87, and Robert Rubin, P.E. 84, indicate, these two screened-in plaintiffs have been specifically deterred from asserting their claim to asylum in the United States or elsewhere by defendants' new policy. Moreover, these repatriated plaintiff class members believe that it would be "suicide" for them to seek asylum through the U.S. Embassy in Port-au-Prince, as defendants now propose. *See* Declaration of Ronald Aubourg, P.E. 87.

11. In its preliminary injunction opinion of April 6, 1992, this Court specifically made the following findings, which conclusively establish plaintiffs' irreparable injury:

> ► "In the wake of the overthrow [of President Aristide], hundreds of Haitians have been killed, tortured, detained without a warrant, or subjected to violence and the destruction of their property because of their political beliefs. Thousands have been forced into hiding." Findings of Fact, ¶ 6.

> ► "Repatriated Haitians face political persecution and even death on their return to Haiti." Findings of Fact, ¶ 24.
>
> ► "The Screened In Plaintiffs may face torture [or] death if they lack access to counsel, fail in their bid to receive asylum, and are repatriated to Haiti." Conclusion of Law, ¶ 12.

12. The attached declarations set forth the following additional facts that confirm plaintiffs' irreparable injury:

> a) The human rights condition in Haiti is terrible and has deteriorated in recent months. Declaration of Ronald Aubourg, P.E. 87; P.E. 92 (*New York Times* account).
>
> b) Members of the plaintiff class that were forcibly repatriated to Haiti because they refused to undergo final determinations of their asylum claims without an attorney have been subjected to abuse and torture upon return and are currently in hiding because they fear torture or even death. Declarations of William O'Neill, P.E. 86; Ronald Aubourg, P.E. 87; Elliot Schrage (I), P.E. 85; Elliot Schrage (II), P.E. 94; and Robert Rubin, P.E. 84.
>
> c) While the Government offers to process refugee claims at the U.S. Embassy in Port-au-Prince, *see* White House Press Release of May 24, Pl. Appendix A, it would be "suicide" for these plaintiff class members who have been repatriated to seek asylum through the U.S. Embassy. Declaration of Ronald Aubourg, P.E. 87; *see also* Declarations of William O'Neill, P.E. 86; Elliot Schrage(II), P.E. 94, and Robert Rubin, P.E. 84.

13. The overseas refugee processing program, which the Government points to as an alternative for interdicted Haitians to asserting an asylum claim when they are detained by the Coast Guard, contains regional quotas for

refugee admissions. The quota of 3,000 for the Caribbean and Latin America this year would be quickly exhausted if the number of Haitians driven to flee Haiti by boat were to resort to the Embassy and there receive a fair evaluation of the merits of their individual claims for refugee status.

14. The overseas refugee processing program, which under the INA ought to involve non-adversarial screening and evaluation of the applicant, is being conducted by the Embassy staff in Port-au-Prince in an adversarial manner. Declaration of William O'Neill, P.E. 86 ¶ 5 (all three Haitians interviewed by the Lawyers Committee delegation who had applied for refugee status through the Embassy reported that their interviews were "interrogations, adversarial and unfriendly processes in which they were pumped for information about ousted President Jean Bertrand Aristide and his supporters").

15. The May 24th Order provides no legal authority for defendants' actions because:

a) Sections 2(c)(3) and 3 of the May 24th Order purport to delegate authority to lower executive officials that far exceeds the scope of the powers granted by Congress to the Executive pursuant to sections 212(f) and 215(a)(1) of the INA and are not authorized by any statutory or constitutional presidential authority;

b) Sections 2(c)(3) and 3 of the May 24th Order violate defendants' binding domestic legal obligations under, *inter alia*, Article 33 of the UN Protocol Relating to the Status of Refugees, the U.S.-Haiti Executive Agreement, and the Immigration and Nationality Act not to forcibly return refugees found to have a credible fear of political persecution;

c) Defendants' *ultar vires* and unlawful actions are arbitrary and capricious, an abuse of discretion, and not in accordance with law in violation of the Administrative Procedure Act (APA);

d) Defendants' actions deny plaintiffs the equal protection of the laws, in violation of the Fifth Amendment of the United States Constitution.

16. Plaintiffs ask this Court to:

(a) *find sufficiently serious questions going to the merits to make them a fair ground for litigation* that Sections 2(c)(3) and 3 of the purported Executive Order issued on May 24, 1992 were issued without legal authority, thus rendering the entire Order null and void;

(b) *to restrain defendants, pending a hearing on plaintiffs' motion for a preliminary injunction, from repatriating*, under the purported authority of the May 24th Order, any interdicted Haitian to Haiti whose life or freedom would be threatened on account of his or her race, religion, nationality, membership in a particular social group or political opinion.

17. The balance of hardships tips decidedly in plaintiffs' favor. The relief requested would impose minimal burdens on defendants, by restoring the *status quo*, as it existed from the Haitian coup in September 1991 until May 24, 1992. Moreover, the relief requested would only hold defendants to representations that they previously made to this Court and the Supreme Court. In February, 1992, defendants assured the Supreme Court that they would repatriate screened-in refugees only after *formal asylum proceedings, with lawyers, in the United States*. They subsequently argued to this Court that such refugees could be repatriated after *de facto* asylum proceedings without lawyers on Guantanamo. Never before did defendants claim an unreviewable power to repatriate thousands of detained Haitians with credible fears of persecution without any asylum process or counsel whatsoever. In any event, the only "injury" to which defendants can point is the increased economic cost of conduct-

ing a lawful and authorized interdiction and repatriation program, pecuniary harm that cannot justify denial of relief. *See, e.g., Federation of Japan Salmon Fisheries Coop. Ass'n v. Baldridge*, 679 F. Supp. 37, 48 (D.D.C. 1987).

18. Plaintiffs are proceeding by Order to Show Cause because of the grave urgency of the situation and daily irreparable injury to their clients. Should the Court desire, plaintiffs are prepared to file supplemental pleadings under Fed. R. Civ. P. 15(d) "setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented."

19. For the reasons stated above, plaintiffs request the emergency relief enumerated in paragraph 16 of this affirmation.

20. No other request for this relief has been made to any other judge of this Court.

/s/ Harold Hongju Koh
HAROLD HONGJU KOH

Dated: May 28, 1992
New Haven, Connecticut

THE WHITE HOUSE

Office of the Press Secretary
(Kennebunkport, Maine)

For Immediate Release May 24, 1992

President Bush has issued an executive order which will permit the U.S. Coast Guard to begin returning Haitians picked up at sea directly to Haiti. This action follows a large surge in Haitian boat people seeking to enter the United States and is necessary to protect the lives of the Haitians, whose boats are not equipped for the 600-mile sea journey.

The large number of Haitian migrants has led to a dangerous and unmanageable situation. Both the temporary processing facility at the U.S. Naval base Guantanamo and the Coast Guard cutters on patrol are filled to capacity. The President's action will also allow continued orderly processing of more than 12,000 Haitians presently at Guantanamo.

Through broadcasts on the Voice of America and public statements in the Haitian media we continue to urge Haitians not to attempt the dangerous sea journey to the United States. Last week alone eighteen Haitians perished when their vessel capsized off the Cuban coast.

Under current circumstances, the safety of Haitians is best assured by remaining in their country. We urge any Haitians who fear persecution to avail themselves of our refugee processing service at our Embassy in Port-au-Prince. The Embassy has been processing refugee claims since February. We utilize this special procedure in only four countries in the world. We are prepared to increase the American embassy staff in Haiti for refugee processing if necessary.

The United States Coast Guard has picked up over 34,000 since the coup in Haiti last September 30. Senior

U.S. officials are seeking the assistance of other countries and the United Nations to help deal with the plight of Haitian boat people, and we will continue our intensive efforts to find alternative solutions to avoid further tragedies on the high seas.

The President has also directed an intensification of our ongoing humanitarian assistance efforts in Haiti. Our current programs total 47 million dollars and provide food for over 600,000 Haitians and health care services which reach nearly two million. We hope other nations will also increase their humanitarian assistance as called for in the resolution on Haiti passed by the OAS Foreign Ministers on May 17.

STATUTORY PROVISIONS INVOLVED

1. The Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, provides:

CHAPTER 7. JUDICIAL REVIEW

§ 701. Application; definitions

(a) This chapter [5 USCS §§ 701 et seq.] applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter [5 USCS §§ 701 et seq.]—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the terriories or possesions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41

[41 USCS §§ 101 et seq.]; or sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix, and

(2) "person," "rule," "order," "license," "sanction," "relief," and "agency action" have the meanings given them by section 551 of this title.

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

2. Relevant provisions of the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*

a. Section 101 of the Act, as codified at 8 U.S.C. 1101, provides in pertinent part:

SUBCHAPTER I—GENERAL PROVISIONS

§ 1101. Definitions

(a) As used in this chapter—

* * * * *

(3) The term "alien" means any person not a citizen or national of the United States.

* * * * *

(17) The term "immigration laws" includes this chapter and all laws, conventions, and treaties of the United States relating to the immigration, exclusion, deportion, or expulsion of aliens.

(38) The term "United States", except as otherwise specifically herein provided, when used in a geographical sense, means the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States.

* * * * *

(42) The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the

case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.

* * * * *

b. Section 207 of the Immigration and Nationality Act, as codified at 8 U.S.C. 1157 (& Supp. II 1990), provides:

§ 1105a. Judicial review of orders of deportation and exclusion

(a) Exclusiveness of procedure

The procedure prescribed by, and all the provisions of chapter 158 of title 28, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation, heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or comparable provisions of any prior Act, except that—

(1) Time for filing petition

a petition for review may be filed not later than 90 days after the date of the issuance of the final deportation order, or, in the case of an alien convicted of an aggravated felony, not later than 30 days after the issuance of such order;

(2) Venue

the venue of any petition for review under this section shall be in the judicial circuit in which the administrative proceedings before a special inquiry

officer were conducted in whole or in part, or in the judicial circuit wherein is the residence, as defined in this chapter, of the petitioner, but not in more than one circuit;

(3) Respondent; service of petition; stay of deportation

the action shall be brought against the Immigration and Naturalization Service, as respondent. Service of the petition to review shall be made upon the Attorney General of the United States and upon the official of the Immigration and Naturalization Service in charge of the Service district in which the office of the clerk of the court is located. The service of the petition for review upon such official of the Service shall stay the deportation of the alien pending determination of the petition by the court, unless the court otherwise directs or unless the alien is convicted of an aggravated felony, in which case the Service shall not stay the deportation of the alien pending determination of the petition of the court unless the court otherwise directs;

(4) Determination upon administrative record

except as provided in clause (B) of paragraph (5) of this subsection, the petition shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive;

(5) Claim of nationality; determination or transfer to district court for hearing de novo

whenever any petitioner, who seeks review of an order under this section, claims to be a national of

the United States and makes a showing that his claim is not frivolous, the court shall (A) pass upon the issues presented when it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or (B) where a genuine issue of material fact as to the petitioner's nationality is presented, transfer the proceedings to a United States district court for the district where the petitioner has his residence for hearing de novo of the nationality claim and determination as if such proceedings were originally initiated in the district court under the provisions of section 2201 of title 28. Any such petitioner shall not be entitled to have such issue determined under section 1503(a) of this title or otherwise;

(6) Consolidation

whenever a petitioner seeks review of an order under this section, any review sought with respect to a motion to reopen or reconsider such an order shall be consolidated with the review of the order;

(7) Challenge of validity of deportation order in criminal proceeding; motion for judicial review before trial; hearing de novo on nationality claim; determination of motion; dismissal of indictment upon invalidity of order; appeal

if the validity of a deportation order has not been judicially determined, its validity may be challenged in a criminal proceeding against the alien for violation of subsection (d) or (e) of section 1252 of this title only by separate motion for judicial review before trial. Such motion shall be determined by the court without a jury and before the trial of the general issue. Whenever a claim to United States nationality is made in such motion, and in the opinion

of the court, a genuine issue of material fact as to the alien's nationality is presented, the court shall accord him a hearing de novo on the nationality claim and determine that issue as if proceedings had been initiated under the provisions of section 2201 of title 28. Any such alien shall not be entitled to have such issue determined under section 1503(a) of this title or otherwise. If no such hearing de novo as to nationality is conducted, the determination shall be made solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial and probative evidence on the record considered as a whole, shall be conclusive. If the deportation order is held invalid, the court shall dismiss the indictment and the United States shall have the right to appeal to the court of appeals within thirty days. The procedure on such appeals shall be as provided in the Federal rules of criminal procedure. No petition for review under this section may be filed by any alien during the pendency of a criminal proceeding against such alien for violation of subsection (d) or (e) of section 1252 of this title;

(8) Deferment of deportation; compliance of alien with other provisions of law; detention or taking into custody of alien

nothing in this section shall be construed to require the Attorney General to defer deportation of an alien after the issuance of a deportation order because of the right of judicial review of the order granted by this section, or to relieve any alien from compliance with subsections (d) and (e) of section 1252 of this title. Nothing contained in this section shall be construed to preclude the Attorney General from detaining or continuing to detain an alien or from taking

him into custody pursuant to subsection (c) of section 1252 of this title at any time after the issuance of a deportation order;

(9) Typewritten record and briefs

it shall not be necessary to print the record or any part thereof, or the briefs, and the court shall review the proceedings on a typewritten record and on typewritten briefs; and

(10) Habeas corpus

any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings.

(b) Limitation of certain aliens to habeas corpus proceedings

Notwithstanding the provisions of any other law, any alien against whom a final order of exclusion has been made heretofore or hereafter under the provisions of section 1226 of this title or comparable provisions of any prior Act may obtain judicial review of such order by habeas corpus proceedings and not otherwise.

(c) Exhaustion of administrative remedies or departure from United States; disclosure of prior judicial proceedings

An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted the administrative remedies available to him as of right under the immigration laws and regulations or if he has departed from the United States after the issuance of the order. Every petition for review or for habeas corpus shall state whether the validity of the order has been upheld in any prior judicial proceeding, and, if so, the na-

ture and date thereof, and the court in which such proceeding took place. No petition for review or for habeas corpus shall be entertained if the validity of the order has been previously determined in any civil or criminal proceeding, unless the petition presents grounds which the court finds could not have been presented in such prior proceeding, or the court finds that the remedy provided by such prior proceeding was inadequate or ineffective to test the validity of the order.

c. Section 207 of the Immigration and Nationality Act, as codified at 8 U.S.C. 1157 (& Supp. II 1990), provides:

§ 1157. Annual admission of refugees and admission of emergency situation refugees

(a) Maximum number of admissions; increases for humanitarian concerns; allocations

(1) Except as provided in subsection (b) of this section, the number of refugees who may be admitted under this section in fiscal year 1980, 1981, or 1982, may not exceed fifty thousand unless the President determines, before the beginning of the fiscal year and after appropriate consultation (as defined in subsection (e) of this section), that admission of a specific number of refugees in excess of such number is justified by humanitarian concerns or is otherwise in the national interest.

(2) Except as provided in subsection (b) of this section, the number of refugees who may be admitted under this section in any fiscal year after fiscal year 1982 shall be such number as the President determines, before the beginning of the fiscal year and after appropriate consultration, is justified by humanitarian concerns or is otherwise in the national interest.

(3) Admissions under this subsection shall be allocated among refugees of special humanitarian concern to the United States in accordance with a determination made by the President after appropriate consultation.

(4) In the determination made under this subsection for each fiscal year (beginning with fiscal year 1992), the President shall enumerate, with the respective number of refugees so determined, the number of aliens who were granted asylum in the previous year.

(b) Determinations by President respecting number of admissions for humanitarian concerns

If the President determines, after appropriate consultation, that (1) an unforeseen emergency refugee situation exists, (2) the admission of certain refugees in response to the emergency refugee situation is justified by grave humanitarian concerns or is otherwise in the national interest, and (3) the admission to the United States of these refugees cannot be accomplished under subsection (a) of this section, the President may fix a number of refugees to be admitted to the United States during the succeeding period (not to exceed twelve months) in response to the emergency refugee situation and such admissions shall be allocated among refugees of special humanitarian concern to the United States in accordance with a determination made by the President after the appropriate consultation provided under this subsection.

(c) Admission by Attorney General of refugees; criteria; admission status of spouse or child; applicability of other statutory requirements; termination of refugee status of alien, spouse or child

(1) Subject to the numerical limitations established pursuant to subsections (a) and (b) of this section, the Attorney General may, in the Attorney General's discretion and pursuant to such regulations as the Attorney General may prescribe, admit any refugee who is not firmly resettled in any foreign country, is determined to be of special humanitarian concern to the United States, and is admissible (except as otherwise provided under paragraph (3)) as an immigrant under this chapter.

(2) A spouse or child (as defined in section 1101(b)(1)(A), (B), (C), (D), or (E) of this title) of any refugee who qualifies for admission under paragraph (1) shall, if not otherwise entitled to admission under paragraph (1) and if not a person described in the second sentence of section 1101(a)(42) of this title, be entitled to the same admission status as such refugee if accompanying, or following to join, such refugee and if the spouse or child is admissible (except as otherwise provided under paragraph (3)) as an immigrant under this chapter. Upon the spouse's or child's admission to the United States, such admission shall be charged against the numerical limitation established in accordance with the appropriate subsection under which the refugee's admission is charged.

(3) The provisions of paragraphs (4), (5), and (7)(A) of section 1182(a) of this title shall not be applicable to any alien seeking admission to the United States under this subsection, and the Attorney General may waive any other provision of such section (other than paragraph (2)(C) or subparagraphs[1] (A), (B), (C), or (E) of paragraph (3)) with respect to such an alien for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest. Any such waiver by the Attorney General shall be in writing and shall be granted only on an individual basis following an investigation. The Attorney General shall provide for the annual reporting to Congress of the number of waivers granted under this paragraph in the previous fiscal year and a summary of the reasons for granting such waivers.

(4) The refugee status of any alien (and of the spouse or child of the alien) may be terminated by the Attorney General pursuant to such regulations as the Attorney General may prescribe if the Attorney General determines that the alien was not in fact a refugee within the meaning of section 1101(a)(42) of this title at the time of the alien's admission.

(d) Oversight reporting and consultation requirements

(1) Before the start of each fiscal year the President shall report to the Committees on the Judiciary of the House of Representatives and of the Senate regarding the foreseeable number of refugees who will be in need of resettlement during the fiscal year and the anticipated allocation of refugee admissions during the fiscal year. The President shall provide for periodic discussions between designated representatives of the President and members of such committees regarding changes in the worldwide refugee situation, the progress of refugee admissions, and the possible need for adjustments in the allocation of admissions among refugees.

(2) As soon as possible after representatives of the President initiate appropriate consultation with respect to the number of refugee admissions under subsection (a) of this section or with respect to the admission of refugees in response to an emergency refugee situation under subsection (b) of this section, the Committees on the Judiciary of the House of Representatives and of the Senate shall cause to have printed in the Congressional Record the substance of such consultation.

(3)(A) After the President initiates appropriate consultation prior to making a determination under subsection (a) of this section, a hearing to review the proposed determination shall be held unless public disclosure of the details of the proposal would jeopardize the lives or safety of individuals.

(B) After the President initiates appropriate consultation prior to making a determination, under subsection (b) of this section, that the number of refugee admissions should be increased because of an unforeseen emergency refugee situation, to the extent that time and the nature of the emergency refugee situation permit, a hearing to review the proposal to increase refugee admissions shall be held unless public disclosure of the details

of the proposal would jeopardize the lives or safety of individuals.

(e) "Appropriate consultation" defined

For purposes of this section, the term "appropriate consultation" means, with respect to the admission of refugees and allocation of refugee admissions, discussions in person by designated Cabinet-level representatives of the President with members of the Committees on the Judiciary of the Senate and of the House of Representatives to review the refugee situation or emergency refugee situation, to project the extent of possible participation of the United States therein, to discuss the reasons for believing that the proposed admission of refugees is justified by humanitarian concerns or grave humanitarian concerns or is otherwise in the national interest, and to provide such members with the following information:

(1) A description of the nature of the refugee situation.

(2) A description of the number and allocation of the refugees to be admitted and an analysis of conditions within the countries from which they came.

(3) A description of the proposed plans for their movement and resettlement and the estimated cost of their movement and resettlement.

(4) An analysis of the anticipated social, economic, and demographic impact of their admission to the United States.

(5) A description of the extent to which other countries will admit and assist in the resettlement of such refugees.

(6) An analysis of the impact of the participation of the United States in the resettlement of such refugees on the foreign policy interests of the United States.

(7) Such additional information as may be appropriate or requested by such members.

To the extent possible, information described in this subsection shall be provided at least two weeks in advance of discussions in person by designated representatives of the President with such members.

d. Section 208 of the Immigration and Nationality Act, as codified at 8 U.S.C. 1158 (& Supp. II 1990), provides:

§ 1158. Asylum procedure

(a) Establishment by Attorney General; coverage

The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

(b) Termination of asylum by Attorney General; criteria

Asylum granted under subsection (a) of this section may be terminated if the Attorney General, pursuant to such regulations as the Attorney General may prescribe, determines that the alien is no longer a refugee within the meaning of section 1101(a)(42)(A) of this title owing to a change in circumstances in the alien's country of nationality or, in the case of an alien having no nationality, in the country in which the alien last habitually resided.

(c) Status of spouse or child or alien granted asylum

A spouse or child (as defined in section 1101(b)(1)(A), (B), (C), (D), or (E) of this title) of an alien

who is granted asylum under subsection (a) of this section may, if not otherwise eligible for asylum under such subsection, be granted the same status as the alien if accompanying, or following to join, such alien.

(d) Aliens convicted of aggravated felony

An alien who has been convicted of an aggravated felony, notwithstanding subsection (a) of this section, may not apply for or be granted asylum.

e. Section 212(f) of the Immigration and Nationality Act, as codified at 8 U.S.C. 1182(f), provides:

§ 1182. Excludable aliens

* * * * *

(f) Suspension of entry or imposition of restrictions by President

Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrant or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

f. Section 215(a) of the Immigration and Nationality Act, as codified at 8 U.S.C. 1185(a), provides:

§ 1185. Travel control of citizens and aliens

(a) Restrictions and prohibitions

Unless otherwise ordered by the President, it shall be unlawful—

(1) for any alien to depart from or enter or attempt to depart from or enter the United States

except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe;

(2) for any person to transport or attempt to transport from or into the United States another person with knowledge or reasonable cause to believe that the departure or entry of such other person is forbidden by this section;

(3) for any person knowingly to make any false statement in an application for permission to depart from or enter the United States with intent to induce or secure the granting of such permission either for himself or for another;

(4) for any person knowingly to furnish or attempt to furnish or assist in furnishing to another a permit or evidence of permission to depart or enter not issued and designed for such other person's use;

(5) for any person knowingly to use or attempt to use any permit or evidence of permission to depart or enter not issued and designed for his use;

(6) for any person to forge, counterfeit, mutilate, or alter, or cause or procure to be forged, counterfeited, mutilated, or altered, any permit or evidence of permission to depart from or enter the United States;

(7) for any person knowingly to use or attempt to use or furnish to another for any false, forged, counterfeited, mutilated, or altered permit, or evidence of permission, or any permit or evidence of permission which, though originally valid, has become or been made void or invalid.

g. Section 235 of the Immigration and Nationality Act, as codified at 8 U.S.C. 1225 (& Supp. II 1990), provides:

§ 1225. Inspection by immigration officers

(a) Powers of officers

The inspection, other than the physical and mental examination, of aliens (including alien crewmen) seeking admission or readmission to or the privilege of passing through the United States shall be conducted by immigration officers, except as otherwise provided in regard to special inquiry officers. All aliens arriving at ports of the United States shall be examined by one or more immigration officers at the discretion of the Attorney General and under such regulations as he may prescribe. Immigration officers are authorized and empowered to board and search any vessel, aircraft, railway car, or other conveyance, or vehicle in which they believe aliens are being brought into the United States. The Attorney General and any immigration officer, including special inquiry officers, shall have power to administer oaths and to take and consider evidence of or from any person touching the privilege of any alien or person he believes or suspects to be an alien to enter, reenter, pass through, or reside in the United States or concerning any matter which is material and relevant to the enforcement of this chapter and the administration of the Service, and, where such action may be necessary, to make a written record of such evidence. Any person coming into the United States may be required to state under oath the purpose or purposes for which he comes, the length of time he intends to remain in the United States, whether or not he intends to remain in the United States permanently and, if an alien, whether he intends to become a citizen thereof, and such other items of information as will aid the immigration officer in determining whether he is a national of the United States or an alien and, if the latter, whether he belongs to any

of the excluded classes enumerated in section 1182 of this title. The Attorney General and any immigration officer, including special inquiry officers, shall have power to require by subpena the attendance and testimony of witnesses before immigration officers and special inquiry officers and the production of books, papers, and documents relating to the privilege of any person to enter, reenter, reside in, or pass through the United States or concerning any matter which is material and relevant to the enforcement of this chapter and the administration of the Service, and to that end may invoke the aid of any court of the United States. Any United States district court within the jurisdiction of which investigations or inquiries are being conducted by an immigration officer or special inquiry officer may, in the event of neglect or refusal to respond to a subpena issued under this subsection or refusal to testify before an immigration officer or special inquiry officer, issue an order requiring such persons to appear before an immigration officer or special inquiry officer, produce books, papers, and documents if demanded, and testify, and any failure to obey such order of the court may be punished by the court as a contempt thereof.

(b) Detention for further inquiry; challenge of favorable decision

Every alien (other than an alien crewman), and except as otherwise provided in subsection (c) of this section and in section 1323(d) of this title, who may not appear to the examining immigration officer at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for further inquiry to be conducted by a special inquiry officer. The decision of the examining immigration officer, if favorable to the admission of any alien, shall be subject to challenge by any other immigration officer and such challenge shall operate to take the alien, whose privilege to land is so challenged, before a special inquiry officer for further inquiry.

(c) Temporary exclusion; permanent exclusion by Attorney General

Any alien (including an alien crewman) who may appear to the examining immigration officer or to the special inquiry officer during the examination before either of such officers to be excludable under subparagraph (A) (other than clause (ii)), (B), or (C) of section 1182(a)(3) of this title shall be temporarily excluded, and no further inquiry by a special inquiry officer shall be conducted until after the case is reported to the Attorney General together with any such written statement and accompanying information, if any, as the alien or his representative may desire to submit in connection therewith and such an inquiry or further inquiry is directed by the Attorney General. If the Attorney General is satisfied that the alien is excludable under any of such paragraphs on the basis of information of a confidential nature, the disclosure of which the Attorney General, in the exercise of his discretion, and after consultation with the appropriate security agencies of the Government, concludes would be prejudicial to the public interest, safety, or security, he may in his discretion order such alien to be excluded and deported without any inquiry or further inquiry by a special inquiry officer. Nothing in this subsection shall be regarded as requiring an inquiry before a special inquiry officer in the case of an alien crewman.

h. Section 236 of the Immigration and Nationality Act, as codified at 8 U.S.C. 1126 (& Supp. II 1990), provides:

§ 1226. Exclusion of aliens

(a) Proceedings

A special inquiry officer shall conduct proceedings under this section, administer oaths, present and receive evidence, and interrogate, examine, and cross-examine the alien or witnesses. He shall have authority in any case

to determine whether an arriving alien who has been detained for further inquiry under section 1225 of this title shall be allowed to enter or shall be excluded and deported. The determination of such special inquiry officer shall be based only on the evidence produced at the inquiry. No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer under this section shall be conducted in accordance with this section, the applicable provisions of sections 1225 and 1357(b) of this title, and such regulations as the Attorney General shall prescribe, and shall be the sole and exclusive procedure for determining admissibility of a person to the United States, under the provisions of this section. At such inquiry, which shall be kept separate and apart from the public, the alien may have one friend or relative present, under such conditions as may be prescribed by the Attorney General. A complete record of the proceedings and of all testimony and evidence produced at such inquiry, shall be kept.

(b) Appeal

From a decision of a special inquiry officer excluding an alien, such alien may take a timely appeal to the Attorney General, and any such alien shall be advised of his right to take such appeal. No appeal may be taken from a temporary exclusion under section 1225(c) of this title. From a decision of the special inquiry officer to admit an alien, the immigration officer in charge at the port where the inquiry is held may take a timely appeal to the Attorney General. An appeal by the alien, or such officer in charge, shall operate to stay any final action with respect to any alien whose case is so appealed until the final decision of the Attorney General is made. Except as

provided in section 1225(c) of this title such decision shall be rendered solely upon the evidence adduced before the special inquiry officer.

(c) Finality of decision of special inquiry officers

Except as provided in subsections (b) or (d) of this section, in every case where an alien is excluded from admission into the United States, under this chapter or any other law or treaty now existing or hereafter made, the decision of a special inquiry officer shall be final unless reversed on appeal to the Attorney General.

(d) Physical and mental defects

If a medical officer or civil surgeon or board or medical officers has certified under section 1224 of this title that an alien has a disease, illness, or addiction which would make the alien excludable under paragraph (1) of section 1182(a) of this title, the decision of the special inquiry officer shall be based solely upon such certification. No alien shall have a right to appeal from such an excluding decision of a special inquiry officer.

(e) Custody of alien

(1) Pending a determination of excludability, the Attorney General shall take into custody any alien convicted of an aggravated felony upon completion of the alien's sentence for such conviction.

(2) Notwithstanding any other provision of this section, the Attorney General shall not release such felon from custody unless the Attorney General determines that the alien may not be deported because the condition described in section 1253(g) of this title exists.

(3) If a determination described in paragraph (2) has been made, the Attorney General may release such alien only after—

(A) a procedure for review of each request for relief under this subsection has been established,

(B) such procedure includes consideration of the severity of the felony committed by the alien, and

(C) the review concludes that the alien will not pose a danger to the safety of other persons or to property.

i. Section 241 of the Immigration and Nationality Act, as codified at 8 U.S.C. 1251 (& Supp. II 1990) provide in relevant part:

PART V—DEPORTATION; ADJUSTMENT OF STATUS

§ 1251. Deportable aliens

(a) Classes of deportable aliens

Any alien (including an alien crewman) in the United States shall, upon the order of the Attorney General, be deported if the alien is deportable as being within one or more of the following classes of aliens:

(1) Excludable at time of entry or of adjustment of status or violates status

(A) Excludable aliens

Any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens excludable by the law existing at such time is deportable.

(B) Entered without inspection

Any alien who entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this chapter or any other law of the United States is deportable.

* * * * *

j. Section 242 of the Immigration and Nationality Act, as codified at 8 U.S.C. 1252 (& Supp. II 1990), provides:

§ 1252. Apprehension and deportation of aliens

(a) Arrest and custody; review of determination by court; aliens committing aggravated felonies; report to Congressional committees

(1) Pending a determination of deportability in the case of any alien as provided in subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into custody. Except as provided in paragraph (2), any such alien taken into custody may, in the discretion of the Attorney General and pending such final determination of deportability, (A) be continued in custody; or (B) be released under bond in the amount of not less than $500 with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe; or (C) be released on conditional parole. But such bond or parole, whether heretofore or hereafter authorized, may be revoked at any time by the Attorney General, in his discretion, and the alien may be returned to custody under the warrant which initiated the proceedings against him and detained until final determination of his deportability. Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or parole pending final decision of deportability upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to determine deportability.

(2)(A) The Attorney General shall take into custody any alien convicted of an aggravated felony upon release of the alien (regardless of whether or not such release

is on parole, supervised release, or probation, and regardless of the possibility of rearrest or further confinement in respect of the same offense). Notwithstanding paragraph (1) or subsections (c) and (d) of this section but subject to subparagraph (B), the Attorney General shall not release such felon from custody.

(B) The Attorney General shall release from custody an alien who is lawfully admitted for permanent residence on bond or such other conditions as the Attorney General may prescribe if the Attorney General determines that the alien is not a threat to the community and that the alien is likely to appear before any scheduled hearings.

(3) (A) The Attorney General shall devise and implement a system—

(i) to make available, daily (on a 24-hour basis), to Federal, State, and local authorities the investigative resources of the Service to determine whether individuals arrested by such authorities for aggravated felonies are aliens;

(ii) to designate and train officers and employees of the Service within each district to serve as a liaison to Federal, State, and local law enforcement and correctional agencies and courts with respect to the arrest, conviction, and release of any alien charged with an aggravated felony; and

(iii) which uses computer resources to maintain a current record of aliens who have been convicted of an aggravated felony and who have been deported; such record shall be made available to inspectors at ports of entry and to border patrol agents at sector headquarters for purposes of immediate identification of any such previously deported alien seeking to reenter the United States.

(B) The Attorney General shall submit reports to the Committees on the Judiciary of the House of Representatives and of the Senate at the end of the 6-month period

and at the end of the 18-month period beginning on the effective date of this paragraph which describe in detail specific efforts made by the Attorney General to implement this paragraph.

(b) Proceedings to determine deportability; removal expenses

A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of deportation. Determination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present, unless by reason of the alien's mental incompetency it is impracticable for him to be present, in which case the Attorney General shall prescribe necessary and proper safeguards for the rights and privileges of such alien. If any alien has been given a reasonable opportunity to be present at a proceeding under this section, and without reasonable cause fails or refuses to attend or remain in attendance at such proceeding, the special inquiry officer may proceed to a determination in like manner as if the alien were present. In any case or class of cases in which the Attorney General believes that such procedure would be of aid in making a determination, he may require specifically or by regulation that an additional immigration officer shall be assigned to present the evidence on behalf of the United States and in such case such additional immigration officer shall have authority to present evidence, and to interrogate, examine and cross-examine the alien or other witnesses in the proceedings. Nothing in the preceding sentence shall be construed to diminish the authority conferred upon the special inquiry officer conducting such

proceedings. No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this chapter, as the Attorney General shall prescribe. Such regulations shall include requirements consistent with section 1252b of this title. The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section. In any case in which an alien is ordered deported from the United States under the provisions of this chapter, or of any other law or treaty, the decision of the Attorney General shall be final. In the discretion of the Attorney General, and under such regulations as he may prescribe, deportation proceedings, including issuance of a warrant of arrest, and a finding of deportability under this section need not be required in the case of any alien who admits to belonging to a class of aliens who are deportable under section 1251 of this title if such alien voluntarily departs from the United States at his own expense, or is removed at Government expense as hereinafter authorized, unless the Attorney General has reason to believe that such alien is deportable under paragraph (2), (3), or (4) of section 1251(a) of this title. If any alien who is authorized to depart voluntarily under the preceding sentence is financially unable to depart at his own expense and the Attorney General deems his removal to be in the best interest of the United States, the expense of such removal may be paid from the appropriation for the enforcement of this chapter.

(c) Final order of deportation; place of detention

When a final order of deportation under administrative processes is made against any alien, the Attorney

General shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien's departure from the United States, during which period, at the Attorney General's discretion, the alien may be detained, released on bond in an amount and containing such conditions as the Attorney General may prescribe, or released on such other condition as the Attorney General may prescribe. Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or other release during such six-month period upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to effect such alien's departure from the United States within such six-month period. If deportation has not been practicable, advisable, or possible, or departure of the alien from the United States under the order of deportation has not been effected, within such six-month period, the alien shall become subject to such further supervision and detention pending eventual deportation as is authorized in this section. The Attorney General is authorized and directed to arrange for appropriate places of detention for those aliens whom he shall take into custody and detain under this section. Where no Federal buildings are available or buildings adapted or suitably located for the purpose are available for rental, the Attorney General is authorized, notwithstanding section 5 of title 41 or section 278a of title 40 to expend, from the appropriation provided for the administration and enforcement of the immigration laws, such amounts as may be necessary for the acquisition of land and the erection, acquisition, maintenance, operation, remodeling, or repair of buildings, sheds, and office quarters (including living quarters for officers where none are otherwise available), and adjunct facilities, necessary for the de-

tention of aliens. For the purposes of this section an order of deportation heretofore or hereafter entered against an alien in legal detention or confinement, other than under an immigration process, shall be considered as being made as of the moment he is released from such detention or confinement, and not prior thereto.

(d) Supervision of deportable alien; violation by alien

Any alien, against whom a final order of deportation as defined in subsection (c) of this section heretofore or hereafter issued has been outstanding for more than six months, shall, pending eventual deportation, be subject to supervision under regulations prescribed by the Attorney General. Such regulations shall include provisions which will require any alien subject to supervision (1) to appear from time to time before an immigration officer for identification; (2) to submit, if necessary, to medical and psychiatric examination at the expense of the United States; (3) to give information under oath as to his nationality, circumstances, habits, associations, and activities, and such other information, whether or not related to the foregoing, as the Attorney General may deem fit and proper; and (4) to conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case. Any alien who shall willfully fail to comply with such regulations, or willfully fail to appear or to give information or submit to medical or psychiatric examination if required, or knowingly give false information in relation to the requirements of such regulations, or knowingly violate a reasonable restriction imposed upon his conduct or activity, shall be fined not more than $1,000 or shall be imprisoned not more than one year, or both.

(e) Penalty for willful failure to depart; suspension of sentence

Any alien against whom a final order of deportation is outstanding by reason of being a member of any of the

classes described in paragraph (2), (3) or (4) of section 1251(a) of this title, who shall willfully fail or refuse to depart from the United States within a period of six months from the date of the final order of deportation under administrative processes, or, if judicial review is had, then from the date of the final order of the court, or shall willfully fail or refuse to make timely application in good faith for travel or other documents necessary to his departure, or who shall connive or conspire, or take any other action, designed to prevent or hamper or with the purpose of preventing or hampering his departure pursuant to such order of deportation, or who shall willfully fail or refuse to present himself for deportation at the time and place required by the Attorney General pursuant to such order of deportation, shall upon conviction be guilty of a felony, and shall be imprisoned not more than ten years: *Provided*, That this subsection shall not make it illegal for any alien to take any proper steps for the purpose of securing cancellation of or exemption from such order of deportation or for the purpose of securing his release from incarceration or custody: *Provided further*, That the court may for good cause suspend the sentence of such alien and order his release under such conditions as the court may prescribe. In determining whether good cause has been shown to justify releasing the alien, the court shall take into account such factors as (1) the age, health, and period of detention of the alien; (2) the effect of the alien's release upon the national security and public peace or safety; (3) the likelihood of the alien's resuming or following a course of conduct which made or would make him deportable; (4) the character of the efforts made by such alien himself and by representatives of the country or countries to which his deportation is directed to expedite the alien's departure from the United States; (5) the reason for the inability of the Government of the United States to secure passports, other travel documents, or deportation facilities

from the country or countries to which the alien has been ordered deported; and (6) the eligibility of the alien for discretionary relief under the immigration laws.

(f) Unlawful reentry

Should the Attorney General find that any alien has unlawfully reentered the United States after having previously departed or been deported pursuant to an order of deportation, whether before or after June 27, 1952, on any ground described in any of the paragraphs enumerated in subsection (e) of this section, the previous order of deportation shall be deemed to be reinstated from its original date and such alien shall be deported under such previous order at any time subsequent to such reentry. For the purposes of subsection (e) of this section the date on which the finding is made that such reinstatement is appropriate shall be deemed the date of the final order of deportation.

(g) Voluntary deportation; payment of expenses

If any alien, subject to supervision or detention under subsections (c) or (d) of this section, is able to depart from the United States under the order of deportation, except that he is financially unable to pay his passage, the Attorney General may in his discretion permit such alien to depart voluntarily, and the expense of such passage to the country to which he is destined may be paid from the appropriation for the enforcement of this chapter, unless such payment is otherwise provided for under this chapter.

(h) Service of prison sentence prior to deportation

An alien sentenced to imprisonment shall not be deported until such imprisonment has been terminated by the release of the alien from confinement. Parole, supervised release, probation, or possibility of rearrest or further confinement in respect of the same offense shall not be a ground for deferral of deportation.

(i) Expeditious deportation of convicted aliens

In the case of an alien who is convicted of an offense which makes the alien subject to deportation, the Attorney General shall begin any deportation proceeding as expeditiously as possible after the date of the conviction.

k. Section 243 of the Immigration and Nationality Act, as codified at 8 U.S.C. 1253 (& Supp. II 1990), provides:

§ 1253. Countries to which aliens shall be deported

(a) Acceptance by designated country; deportation upon nonacceptance by country. The deportation of an alien in the United States provided for in this Act, or any other Act or treaty, shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept him into its territory, unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States. No alien shall be permitted to make more than one such designation, nor shall any alien designate, as the place to which he wishes to be deported, any foreign territory contiguous to the United States or any island adjacent thereto or adjacent to the United States unless such alien is a native, citizen, subject, or national of, or had a residence in such designated foreign contiguous territory or adjacent island. If the government of the country designated by the alien fails finally to advise the Attorney General within three months following original inquiry whether that government will or will not accept such alien into its territory, such designation may thereafter be disregarded. Thereupon deportation of such alien shall be directed to any country of which such alien is a subject, national, or

citizen if such country is willing to accept him into its territory. If the government of such country fails finally to advise the Attorney General or the alien within three months following the date of original inquiry, or within such other period as the Attorney General shall deem reasonable under the circumstances in a particular case, whether that government will or will not accept such alien into its territory, then such deportation shall be directed by the Attorney General within his discretion and without necessarily giving any priority or preference because of their order as herein set forth either—

(1) to the country from which such alien last entered the United States;

(2) to the country in which is located the foreign port at which such alien embarked for the United States or for foreign contiguous territory;

(3) to the country in which he was born;

(4) to the country in which the place of his birth is situated at the time he is ordered deported;

(5) to any country in which he resided prior to entering the country from which he entered the United States;

(6) to the country which had sovereignty over the birthplace of the alien at the time of his birth; or

(7) if deportation to any of the foregoing places or countries is impracticable, inadvisable, or impossible, then to any country which is willing to accept such alien into its territory.

(b) Deportation during war. If the United States is at war and the deportation, in accordance with the provisions of subsection (a), of any alien who is deportable under any law of the United States shall be found by the Attorney General to be impracticable, inadvisable, inconvenient,

or impossible because of enemy occupation of the country from which such alien came or wherein is located the foreign port at which he embarked for the United States or because of reasons connected with the war, such alien may, in the discretion of the Attorney General, be deported as follows:

(1) if such alien is a citizen or subject of a country whose recognized government is in exile, to the country in which is located that government in exile if that country will permit him to enter its territory; or

(2) if such alien is a citizen or subject of a country whose recognized government is not in exile, then to a country or any political or territorial subdivision thereof which is proximate to the country of which the alien is a citizen or subject, or, with the consent of the country of which the alien is a citizen or subject, to any other country.

(c) Payment of deportation costs; within five years. If deportation proceedings are instituted at any time within five years after the entry of the alien for causes existing prior to or at the time of entry, the cost of removal to the port of deportation shall be at the expense of the appropriation for the enforcement of this Act, and the deportation from such port shall be at the expense of the owner or owners of the vessels, aircraft, or other transportation lines by which such alien came to the United States, or if in the opinion of the Attorney General that is not practicable, at the expense of the appropriation for the enforcement of this Act: Provided, That the costs of the deportation of any such alien from such port shall not be assessed against the owner or owners of the vessels, aircraft, or other transportation lines in the case of any alien who arrived in possession of a valid unexpired immigrant visa and who was inspected and admitted to the United States for permanent residence. In the case

of an alien crewman, if deportation proceedings are instituted at any time within five years after the granting of the last conditional permit to land temporarily under the provisions of section 252 [8 USCS § 1282], the cost of removal to the port of deportation shall be at the expense of the appropriation for the enforcement of this Act and the deportation from such port shall be at the expense of the owner or owners of the vessels or aircraft by which such alien came to the United States, or if in the opinion of the Attorney General that is not practicable, at the expense of the appropriation for the enforcement of this Act.

(d) Cost of deportation, subsequent to five years. If deportation proceedings are instituted later than five years after the entry of the alien, or in the case of an alien crewman later than five years after the granting of the last conditional permit to land temporarily, the cost thereof shall be payable from the appropriation for the enforcement of this Act.

(e) Refusal to transport or to pay. A failure or refusal on the part of the master, commanding officer, agent, owner, charterer, or consignee of a vessel, aircraft, or other transportation line to comply with the order of the Attorney General to take on board, guard safely, and transport to the destination specified any alien ordered to be deported under the provisions of this Act, or a failure or refusal by any such person to comply with an order of the Attorney General to pay deportation expenses in accordance with the requirements of this section, shall be punished by the imposition of a penalty in the sum and manner prescribed in section 237(b) [8 USCS § 1227(b)].

(f) Payment of expenses of physically incapable deportees. When in the opinion of the Attorney General the mental or physical condition of an alien being deported is such as to require personal care and attendance, the

Attorney General shall, when necessary, employ a suitable person for that purpose who shall accompany such alien to his final destination, and the expense incident to such service shall be defrayed in the same manner as the expense of deporting the accompanied alien is defrayed, and any failure or refusal to defray such expenses shall be punished in the manner prescribed by subsection (e) of this section.

(g) Countries delaying acceptance of deportees. Upon the notification by the Attorney General that any country upon request denies or unduly delays acceptance of the return of any alien who is a national, citizen, subject, or resident thereof, the Secretary of State shall instruct consular officers performing their duties in the territory of such country to discontinue the issuance of immigrant visas to nationals, citizens, subjects, or residents of such country, until such time as the Attorney General shall inform the Secretary of State that such country has accepted such alien.

(h) Withholding of deportation or return. (1) The Attorney General shall not deport or return any alien (other than an alien described in section 1251(d)(4)(D) of this title) to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion. (2) Paragraph (1) shall not apply to any alien if the Attorney General determines that—

(A) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;

(B) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;

(C) there are serious reasons for considering that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States; or

(D) there are reasonable grounds for regarding the alien as a danger to the security of the United States.

For purposes of subparagraph (B), an alien who has been convicted of an aggravated felony shall be considered to have committed a particularly serious crime.

3. 14 U.S.C. 89 provides:

§ 89. Law enforcement

(a) The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance. When from such inquiries, examination, inspection, or search it appears that a breach of the laws of the United States rendering a person liable to arrest is being, or has been committed, by any person, such person shall be arrested or, if escaping to shore, shall be immediately pursued and arrested on shore, or other lawful and appropriate action shall be taken; or, if it shall appear that a breach of the laws of the United States has been committed so as to render such vessel, or the merchandise, or any part thereof, on board of, or brought into the United States by, such vessel, liable to forfeiture, or so as to render such vessel liable to a fine or penalty and if

necessary to secure such fine or penalty, such vessel or such merchandise, or both, shall be seized.

(b) The officers of the Coast Guard insofar as they are engaged, pursuant to the authority contained in this section, in enforcing any law of the United States shall:

(1) be deemed to be acting as agents of the particular executive department or independent establishment charged with the administration of the particular law; and

(2) be subject to all the rules and regulations promulgated by such department or independent establishment with respect to the enforcement of that law.

(c) The provisions of this section are in addition to any powers conferred by law upon such officers, and not in limitation of any powers conferred by law upon such officers, or any other officers of the United States.

4. 8 C.F.R. Part 207 provides in relevant part:

PART 207—ADMISSION OF REFUGEES

* * * * *

§ 207.1 Eligibility.

(a) *Presidential designation.* Before the beginning of each fiscal year the President determines (after appropriate consultation) the number and allocation of refugees who are of special humanitarian concern to the United States and who are to be admitted during the succeeding twelve months. Any alien who believes he/she is a "refugee" as defined in section 101(a)(42) of the Act, and is included in a refugee group of special humanitarian concern as designated by the President, may apply for admission to the United States by filing Form I-590 (Registration for Classification as Refugee) with the overseas Immigration and Naturalization Service's officer

in charge responsible for the area where the applicant is located. In those areas too distant from an officer in charge, making direct filing impracticable, the Form I-590 may be filed preliminarily at a designated consular office.

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§ 207.3 Inadmissible applicant.

(a) *Statutory exclusion.* An applicant within the class of aliens excluded from admission to the United States under paragraphs (27), (29), (33), or so much of paragraph (23) as it relates to trafficking in narcotics of section 212(a) of the Act, shall not be admitted as a refugee under section 207 of the Act. However, an applicant seeking refugee status under section 207 is exempt by statute from the exclusionary provisions of paragraphs (14), (15), (20), (21), (25), and (32) of section 212(a) of the Act and a waiver of exclusion is not required.

(b) *Waiver of exclusion.* Except for the exclusionary and statutory exemption provisions noted in § 207.3(a) any other exclusionary provisions of section 212(a) of the Act may be waived for humanitarian purposes, to assure family unity, or when it is in the public interest. This authority is delegated to officers in charge who shall initiate the necessary investigations to establish the facts in each waiver application pending before them. Form I-602 (Application by Refugee for Waiver of Grounds of Excludability) may be filed with the officer in charge before whom the applicant's Form I-590 is pending. The burden is upon the applicant to show that the waiver should be granted based upon: (1) Humanitarian purposes, (2) family unity, or (3) public interest. The applicant shall be notified in writing regarding the application for waiver, including the reason for denial if the application is denied. There is no appeal from a waiver denial under this chapter.

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§ 207.5 Waiting lists and priority handling.

Waiting lists are maintained for each designated refugee group of special humanitarian concern. Each applicant whose application is accepted for filing by the Immigration and Naturalization Service shall be registered as of the date of filing. The date of filing is the priority date for purposes of case control. Refugees or groups of refugees may be selected from these lists in a manner that will best support the policies and interests of the United States. The Attorney General may adopt appropriate criteria for selecting the refugees and assignment of processing priorities for each designated group based upon such considerations as: Reuniting families, close association with the United States, compelling humanitarian concerns, and public interest factors.

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5. 8 C.F.R. Part 208 provides in relevant part:

PART 208—ASYLUM

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§ 208.3 Form of application.

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(b) An application for asylum shall be deemed to constitute at the same time an application for withholding of deportation, pursuant to §§ 208.16, 236.3, and 242.17 of this chapter.

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§ 208.16 Entitlement to withholding of deportation.

(a) *Consideration of application for withholding of deportation.* If the Asylum Officer denies an alien's application for asylum, he shall also decide whether the alien is entitled to withholding of deportation under section 243(h) of the Act. If the application for asylum is

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granted, no decision on withholding of deportation will be made unless and until the grant of asylum is later revoked or terminated and deportation proceedings at which a new request for withholding of deportation is made are commenced. In such proceedings, an Immigration Judge may adjudicate both a renewed asylum claim and a request for withholding of deportation simultaneously whether or not asylum is granted.

(b) *Eligibility for withholding of deportation; burden of proof.* The burden of proof is on the applicant for withholding of deportation to establish that his life or freedom would be threatened in the proposed country of deportation on account of race, religion, nationality, membership in a particular social group, or political opinion. The testimony of the applicant, if credible in light of general conditions in the applicant's country of nationality or last habitual residence, may be sufficient to sustain the burden of proof without corroboration. The evidence shall be evaluated as follows:

(1) The applicant's life or freedom shall be found to be threatened if it is more likely than not that he would be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion.

(2) If the applicant is determined to have suffered persecution in the past such that his life or freedom was threatened in the proposed country of deportation on account of race, religion, nationality, membership in a particular social group, or political opinion, it shall be presumed that his life or freedom would be threatened on return to that country unless a preponderance of the evidence establishes that conditions in the country have changed to such an extent that it is no longer more likely than not that the applicant would be so persecuted there.

(3) In evaluating whether the applicant has sustained the burden of proving that his life or freedom would be threatened in a particular country on account of race, religion, nationality, membership in a particular social

group, or political opinion, the Asylum Officer or Immigration Judge shall not require the applicant to provide eivdence that he would be singled out individually for such persecution if:

(i) He establishes that there is a pattern or practice in the country of proposed deportation of persecution of groups of persons similarly situated to the applicant on account of race, religion, nationality, membership in a particular social group, or political opinion; and

(ii) He establishes his own inclusion in and identification with such group of persons such that it is more likely than not that his life or freedom would be threatened upon return.

(4) In addition, the Asylum Officer or Immigration Judge shall give due consideration to evidence that the life or freedom of nationals or residents of the country of claimed persecution is threatened if they leave the country without authorization or seek asylum in another country.

(c) *Approval or denial of application.* The following standards shall govern approval or denial of applications for withholding of deportation:

(1) Subject to paragraph (c)(2) of this section, an application for withholding of deportation to a country of proposed deportation shall be granted if the applicant's eligibility for withholding is established pursuant to paragraph (b) of this section.

(2) An application for withholding of deportation shall be denied if:

(i) The alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion;

(ii) The alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States;

(iii) There are serious reasons for considering that the alien has committed a serious nonpolitical crime out-

side the United States prior to arrival in the United States; or

(iv) There are reasonable grounds for regarding the alien as a danger to the security of the United States.

(3) If the evidence indicates that one or more of the grounds for denial of withholding of deportation enumerated in paragraph (c)(2) of this section apply, the applicant shall have the burden of proving by a preponderance of the evidence that such grounds do not apply.

(4) In the event that an applicant is denied asylum solely in the exercise of discretion, and the applicant is subsequently granted withholding of deportation under this section, thereby effectively precluding admission of the applicant's spouse or minor children following to join him, the denial of asylum shall be reconsidered. Factors to be so considered will include the reasons for the denial and reasonable alternatives available to the applicant such as reunification with his spouse or minor children in a third country.

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6. Executive Order 12324, 46 Fed. Reg. 48,109 (Sept. 29, 1981), provides:

Interdiction of Illegal Aliens

By the authority vested in me as President by the Constitution and statutes of the United States of America, including Sections 212(f) and 215(a)(1) of the Immigration and Nationality Act, as amended (8 U.S.C. 1182(f) and 1185(a)(1)), in view of the continuing problem of migrants coming to the United States, by sea, without necessary entry documents, and in order to carry out the suspension and interdiction of such entry which have concurrently been proclaimed, it is hereby ordered as follows:

Section 1. The Secretary of State shall undertake to enter into, on behalf of the United States, cooperative ar-

rangements with appropriate foreign governments for the purpose of preventing illegal migration to the United States by sea.

Sec. 2. (a) The Secretary of the Department in which the Coast Guard is operating shall issue appropriate instructions to the Coast Guard in order to enforce the suspension of the entry of undocumented aliens and the interdiction of any defined vessel carrying such aliens.

(b) Those instructions shall apply to any of the following defined vessels:

(1) Vessels of the United States, meaning any vessel documented under the laws of the United States, or numbered as provided by the Federal Boat Safety Act of 1971, as amended (46 U.S.C. 1451 *et seq.*), or owned in whole or in part by the United States, a citizen of the United States, or a corporation incorporated under the laws of the United States of any State, Territory, District, Commonwealth, or possession thereof, unless the vessel has been granted nationality by a foreign nation in accord with Article 5 of the Convention on the High Seas of 1958 (U.S. TIAS 5200; 13 UST 2312).

(2) Vessels without nationality or vessels assimilated to vessels without nationality in accordance with paragraph (2) of Article 6 of the Convention on the High Seas of 1958 (U.S. TIAS 5200; 13 UST 2312).

(3) Vessels of foreign nations with whom we have arrangements authorizing the United States to stop and board such vessels.

(c) Those instructions to the Coast Guard shall include appropriate directives providing for the Coast Guard:

(1) To stop and board defined vessels, when there is reason to believe that such vessels are engaged in the irregular transportation of persons or violations of United

States law or the law of a country with which the United States has an arrangement authorizing such action.

(2) To make inquiries of those on board, examine documents and take such actions as are necessary to establish the registry, condition and destination of the vessel and the status of those on board the vessel.

(3) To return the vessel and its passengers to the country from which it came, when there is reason to believe that an offense is being committed against the United States immigration laws, or appropriate laws of a foreign country with which we have an arrangement to assist: provided, however, that no person who is a refugee will be returned without his consent.

(d) These actions, pursuant to this Section, are authorized to be undertaken only outside the territorial waters of the United States.

Sec. 3. The Attorney General shall, in consultation with the Secretary of State and the Secretary of the Department in which the Coast Guard is operating, take whatever steps are necessary to ensure the fair enforcement of our laws relating to immigration (including effective implementation of this Executive Order) and the strict observance of our international obligations concerning those who genuinely flee persecution in their homeland.

/s/ Ronald Reagan

THE WHITE HOUSE.
September 29, 1981.

7. Presidential Proclamation 4865, 46 Fed. Reg. 48,107 (Sept. 29, 1981), provides:

High Seas Interdiction of Illegal Aliens

By the President of the United States of America

A Proclamation

The ongoing migration of persons to the United States in violation of our laws is a serious national problem detrimental to the interests of the United States. A particularly difficult aspect of the problem is the continuing illegal migration by sea of large numbers of undocumented aliens into the southeastern United States. These arrivals have severely strained the law enforcement resources of the Immigration and Naturalization Service and have threatened the welfare and safety of communities in that region.

As a result of our discussions with the Governments of affected foreign countries and with agencies of the Executive Branch of our Government, I have determined that new and effective measures to curtail these unlawful arrivals are necessary. In this regard, I have determined that international cooperation to intercept vessels trafficking in illegal migrants is a necessary and proper means of insuring the effective enforcement of our laws.

NOW, THEREFORE, I, RONALD REAGAN, President of the United States of America, by the authority vested in me by the Constitution and the statutes of the United States, including Sections 212(f) and 215(a)(1) of the Immigration and Nationality Act, as amended (8 U.S.C. 1182(f) and 1185(a)(1)), in order to protect the sovereignty of the United States, and in accordance with cooperative arrangements with certain foreign governments, and having found that the entry of undocumented aliens, arriving at the borders of the United States from

the high seas, is detrimental to the interests of the United States, do proclaim that:

The entry of undocumented aliens from the high seas is hereby suspended and shall be prevented by the interdiction of certain vessels carrying such aliens.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-ninth day of September, in the year of our Lord nineteen hundred and eighty-one, and of the Independence of the United States of America the two hundred and sixth.

/s/ Ronald Reagan

3. Executive Order No. 12807, 57 Fed. Reg. 23,133 (May 24, 1992), provides:

Interdiction of Illegal Aliens

By the authority vested in me as President by the Constitution and the laws of the United States of America, including sections 212(f) and 215(a)(1) of the Immigration and Nationality Act, as amended (8 U.S.C. 1182(f) and 1185(a)(1)), and whereas:

(1) The President has authority to suspend the entry of aliens coming by sea to the United States without necessary documentation, to establish reasonable rules and regulations regarding, and other limitations on, the entry or attempted entry of aliens into the United States, and to repatriate aliens interdicted beyond the territorial sea of the United States;

(2) The international legal obligations of the United States under the United Nations Protocol Relating to the Status of Refugees (U.S. T.I.A.S. 6577; 19 U.S.T. 6223) to apply Article 33 of the United Nations Convention Relating to the Status of Refugees do not extend to persons located outside the territory of the United States;

(3) Proclamation No. 4865 suspends the entry of all undocumented aliens into the United States by the high seas; and

(4) There continues to be a serious problem of persons attempting to come to the United States by sea without necessary documentation and otherwise illegally;

I, GEORGE BUSH, President of the United States of America, hereby order as follows:

Section 1. The Secretary of State shall undertake to enter into, on behalf of the United States, cooperative arrangements with appropriate foreign governments for the purpose of preventing illegal migration to the United States by sea.

Sec. 2. (a) The Secretary of the Department in which the Coast Guard is operating, in consultation, where appropriate, with the Secretary of Defense, the Attorney General, and the Secretary of State, shall issue appropriate instructions to the Coast Guard in order to enforce the suspension of the entry of undocumented aliens by sea and the interdiction of any defined vessel carrying such aliens.

(b) Those instructions shall apply to any of the following defined vessels:

(1) Vessels of the United States, meaning any vessel documented or numbered pursuant to the laws of the United States, or owned in whole or in part by the United States, a citizen of the United States, or a corporation incorporated under the laws of the United States or any State, Territory, District, Commonwealth, or possession thereof, unless the vessel has been granted nationality by a foreign nation in accord with Article 5 of the Convention on the High Seas of 1958 (U.S. T.I.A.S. 5200; 13 U.S.T. 2312).

(2) Vessels without nationality or vessels assimilated to vessels without nationality in accordance with para-

graph (2) of Article 6 of the Convention on the High Seas of 1958 (U.S. T.I.A.S. 5200; 13 U.S.T. 2312).

(3) Vessels of foreign nations with whom we have arrangements authorizing the United States to stop and board such vessels.

(c) Those instructions to the Coast Guard shall include appropriate directives providing for the Coast Guard:

(1) To stop and board defined vessels, when there is reason to believe that such vessels are engaged in the irregular transportation of persons or violations of United States law or the law of a country with which the United States has an arrangement authorizing such action.

(2) To make inquiries of those on board, examine documents and take such actions as are necessary to carry out this order.

(3) To return the vessel and its passengers to the country from which it came, or to another country, when there is reason to believe that an offense is being committed against the United States immigration laws, or appropriate laws of a foreign country with which we have an arrangement to assist; provided, however, that the Attorney General, in his unreviewable discretion, may decide that a person who is a refugee will not be returned without his consent.

(d) These actions, pursuant to this section, are authorized to be undertaken only beyond the territorial sea of the United States.

Sec. 3. This order is intended only to improve the internal management of the Executive Branch. Neither this order nor any agency guidelines, procedures, instructions, directives, rules or regulations implementing this order shall create, or shall be construed to create, any right or benefit, substantive or procedural (including without limitation any right or benefit under the Ad-

ministrative Procedure Act), legally enforceable by any party against the United States, its agencies or instrumentalities, officers, employees, or any other person. Nor shall this order be construed to require any procedures to determine whether a person is a refugee.

Sec. 4. Executive Order No. 12324 is hereby revoked and replaced by this order.

Sec. 5. This order shall be effective immediately.

/s/ George Bush

THE WHITE HOUSE,

May 24, 1992.

9. The Agreement Between the United States and the Republic of Haiti, T.I.A.S. 10241, provides:

Agreement effected by exchange of notes
Signed at Port-au-Prince September 23, 1981;
Entered into force September 23, 1981.

The American Ambassador to the Haitian Secretary of State for Foreign Affairs

EMBASSY OF THE
UNITED STATES OF AMERICA
PORT-AU-PRINCE, HAITI

No. 277 *September 23, 1981*

EXCELLENCY:

I have the honor to refer to the mutual concern of the Governments of the United States and of the Republic of Haiti to stop the clandestine migration of numerous residents of Haiti to the United States and to the mutual desire of our two countries to cooperate to stop such illegal migration.

The United States Government confirms the understandings discussed by representatives of our two governments for the establishment of a cooperative program of interdiction and selective return to Haiti of certain Haitian migrants and vessels involved in illegal transport of persons coming from Haiti.

Having regard to the need for international cooperation regarding law enforcement measures taken with respect to vessels on the high seas and the international obligations mandated in the Protocol Relating to the Status of Refugees done at New York 31 January

1967,[1] the United States Government confirms with the Government of the Republic of Haiti its understanding of the following points of agreement:

Upon boarding a Haitian flag vessel, in accordance with this agreement, the authorities of the United States Government may address inquiries, examine documents and take such measures as are necessary to establish the registry, condition and destination of the vessel and the status of those on board the vessel. When these measures suggest that an offense against United States immigration laws or appropriate Haitian laws has been or is being committed, the Government of the Republic of Haiti consents to the detention on the high seas by the United States Coast Guard of the vessels and persons found on board.

The Government of Haiti agrees to permit upon prior notification the return of detained vessels and persons to a Haitian port, or if circumstances permit, the United States Government will release such vessels and migrants on the high seas to representatives of the Government of the Republic of Haiti.

The Government of the Republic of Haiti also agrees in the case of a U.S. flag vessel, outbound from Haiti, and engaged in such illegal trafficking, to permit, upon prior notification, the return to a Haitian port of that vessel and those aboard.

In any case where a Haitian flag vessel is detained, the authorities of the United States Government shall promptly inform the authorities of the Government of the Republic of Haiti of the action taken and shall keep them fully informed of any subsequent developments.

The Government of the Republic of Haiti agrees, to the extent permitted by Haitian law, to prosecute illegal traffickers of Haitian migrants who do not have requisite permission to enter the country of the vessel's destination

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[1] TIAS 6577; 19 UST 6223.

and to confiscate Haitian vessels or stateless vessels involved in such trafficking. The United States Government likewise agrees, to the extent permitted by United States law, to prosecute traffickers of United States nationality and to confiscate United States vessels engaged in such trafficking.

The Government of the United States agrees to the presence of a representative of the Navy of the Republic of Haiti as liaison aboard any United States vessel engaged in the implementation of this cooperative program.

The United States Government appreciates the assurances which it has received from the Government of the Republic of Haiti that Haitians returned to their country and who are not traffickers will not be subject to prosecution for illegal departure.

It is understood that under these arrangements the United States Government does not intend to return to Haiti any Haitian migrants whom the United States authorities determine to qualify for refugee status.

In furtherance of this cooperative undertaking the United States Government formally requests the Government of the Republic of Haiti's consent to the boarding by the authorities of the United States Government of private Haitian flag vessels [in any case] in which such authorities have reason to believe that the vessels may be involved in the irregular carriage of passengers outbound from Haiti.

I have the honor to propose that, if the foregoing is acceptable to the Government of the Republic of Haiti, this note and Your Excellency's confirmatory reply constitute an agreement between the United States Government and the Government of the Republic of Haiti which shall enter into force on the date of your reply and shall continue in force until six months from the date either government gives notice to the other of its intention to terminate the agreement.

Accept, Excellency, the renewed assurances of my highest consideration.

ERNEST H. PREEG

His Excellency
EDOUARD FRANCISQUE
Secretary of State for Foreign Affairs
Port-au-Prince

TRANSLATION

Republic of Haiti
Ministry of Foreign Affairs

Port-au-Prince, September 23, 1981

No. SG/CG: 2008

Mr. Ambassador:

I have the honor to acknowledge receipt of letter No. 277 of September 23, 1981, which reads as follows:

(For the English language text, see pp. 1-3.)

I have the honor to inform you that the Haitian Government agrees to the proposals transcribed above. Consequently, your letter and this reply shall constitute an agreement effected by an exchange of notes between the Government of the United States of America and the Government of the Republic of Haiti.

This agreement shall enter into force on September 23, 1981.

Accept, Mr. Ambassador, the renewed assurances of my high consideration.

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EDOUARD FRANCISQUE
Minister of Foreign Affairs

His Excellency
Ernest H. Preeg,
Ambassador Extraordinary and Plenipotentiary
of the United States of America to Haiti.

10. The United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, provides:

PREAMBLE

The High Contracting Parties,

Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination,

Considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms,

Considering that it is desirable to revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and the protection accorded by such instruments by means of a new agreement,

Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation,

Expressing the wish that all States, recognizing the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States,

Noting that the United Nations High Commissioner for Refugees is charged with the task of supervising international conventions providing for the protection of refugees, and recognizing that the effective co-ordination of measures taken to deal with this problem will depend upon the co-operation of States with the High Commissioner,

Have agreed as follows:

CHAPTER I

GENERAL PROVISIONS

Article 1.—Definition of the term "refugee"

A. For the purposes of the present Convention, the term "refugee" shall apply to any person who:

(1) Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization;

Decisions of non-eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfil the conditions of paragraph 2 of this section;

(2) As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

In the case of a person who has more than one nationality, the term "the country of his nationality" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

B. (1) For the purposes of this Convention, the words "events occurring before 1 January 1951" in article 1, section A, shall be understood to mean either (*a*) "events occurring in Europe before 1 January 1951"; or (*b*) "events occurring in Europe or elsewhere before 1 January 1951"; and each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this Convention.

(2) Any Contracting State which has adopted alternative (*a*) may at any time extend its obligations by adopting alternative (*b*) by means of a notification addressed to the Secretary-General of the United Nations.

C. This Convention shall cease to apply to any person falling under the terms of section A if:

(1) He has voluntarily re-availed himself of the protection of the country of his nationality; or

(2) Having lost his nationality, he has voluntarily reacquired it; or

(3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or

(4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or

(5) He can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;

Provided that this paragraph shall not apply to a refugee falling under section A(1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;

(6) Being a person who has no nationality he is, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence;

Provided that this paragraph shall not apply to a refugee falling under section A(1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.

D. This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.

When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall *ipso facto* be entitled to the benefits of this Convention.

E. This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(*a*) He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(*b*) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(*c*) He has been guility of acts contrary to the purposes and principles of the United Nations.

Article 2.—General obligations

Every refugee has duties to the country in which he finds himself, which require in particular that he con-

form to its laws and regulations as well as to measures taken for the maintenance of public order.

Article 3.—Non-discrimination

The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.

Article 4.—Religion

The Contracting States shall accord to refugees within their territories treatment at least as favorable as that accorded to their nationals with respect to freedom to practice their religion and freedom as regards the religious education of their children.

Article 5.—Rights granted apart from this Convention

Nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention.

Article 6.—The term "in the same circumstances"

For the purposes of this Convention, the term "in the same circumstances" implies that any requirements (including requirements as to length and conditions of sojourn or residence) which the particular individual would have to fulfil for the enjoyment of the right in question, if he were not a refugee, must be fulfilled by him, with the exception of requirements which by their nature a refugee is incapable of fulfilling.

Article 7.—Exemption from reciprocity

1. Except where this Convention contains more favourable provisions, a Contracting State shall accord to refugees the same treatment as is accorded to aliens generally.

2. After a period of three years' residence, all refugees shall enjoy exemption from legislative reciprocity in the territory of the Contracting States.

3. Each Contracting State shall continue to accord to refugees the rights and benefits to which they were already entitled, in the absence of reciprocity, at the date of entry into force of this Convention for that State.

4. The Contracting States shall consider favourably the possibility of according to refugees, in the absence of reciprocity, rights and benefits beyond those to which they are entitled according to paragraphs 2 and 3, and to extending exemption from reciprocity to refugees who do not fulfil the conditions provided for in paragraphs 2 and 3.

5. The provisions of paragraphs 2 and 3 apply both to the rights and benefits referred to in articles 13, 18, 19, 21 and 22 of this Convention and to rights and benefits for which this Convention does not provide.

Article 8.—Exemption from exceptional measures

With regard to exceptional measures which may be taken against the person, property or interests of nationals of a foreign State, the Contracting States shall not apply such measures to a refugee who is formally a national of the said State solely on account of such nationality. Contracting States which, under their legislation, are prevented from applying the general principle expressed in this article, shall, in appropriate cases, grant exemptions in favour of such refugees.

Article 9.—Provisional measures

Nothing in this Convention shall prevent a Contracting State, in time of war or other grave and exceptional circumstances, from taking provisionally measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in his case in the interests of national security.

Article 10.—Continuity of residence

1. Where a refugee has been forcibly displaced during the Second World War and removed to the territory of a Contracting State, and is resident there, the period of such enforced sojourn shall be considered to have been lawful residence within that territory.

2. Where a refugee has been forcibly displaced during the Second World War from the territory of a Contracting State and has, prior to the date of entry into force of this Convention, returned there for the purpose of taking up residence, the period of residence before and after such enforced displacement shall be regarded as one uninterrupted period for any purposes for which uninterrupted residence is required.

Article 11.—Refugee seamen

In the case of refugees regularly serving as crew members on board a ship flying the flag of a Contracting State, that State shall give sympathetic consideration to their establishment on its territory and the issue of travel documents to them or their temporary admission to its territory particularly with a view to facilitating their establishment in another country.

CHAPTER II

JURIDICAL STATUS

Article 12.—Personal status

1. The personal status of a refugee shall be governed by the law of the country of his domicile or, if he has no domicile, by the law of the country of his residence.

2. Rights previously acquired by a refugee and dependent on personal status, more particularly rights at-

taching to marriage, shall be respected by a Contracting State, subject to compliance, if this be necessary, with the formalities required by the law of that State, provided that the right in question is one which would have been recognized by the law of that State had he not become a refugee.

Article 13.—Movable and immovable property

The Contracting States shall accord to a refugee treatment as favourable as possible and, in any event, not less faovourable than that accorded to aliens generally in the same circumstances, as regards the acquisition of movable and immovable property and other rights pertaining thereto, and to leases and other contracts relating to movable and immovable property.

Article 14.—Artistic rights and industrial property

In respect of the protection of industrial property, such as inventions, designs or models, trade marks, trade names, and of rights in literary, artistic and scientific works, a refugee shall be accorded in the country in which he has his habitual residence the same protection as is accorded to nationals of that country. In the territory of any other Contracting States, he shall be accorded the same protection as is accorded in that territory to nationals of the country in which he has his habitual residence.

Article 15.—Right of association

As regards non-political and non-profit-making associations and trade unions the Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country, in the same circumstances.

Article 16.—Access to courts

1. A refugee shall have free access to the courts of law on the territory of all Contracting States.

2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from *cautio judicatum solvi*.

3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.

CHAPTER III

GAINFUL EMPLOYMENT

Article 17.—Wage-earning employment

1. The Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment.

2. In any case, restrictive measures imposed on aliens or the employment of aliens for the protection of the national labour market shall not be applied to a refugee who was already exempt from them at the date of entry into force of this Convention for the Contracting State concerned, or who fulfils one of the following conditions:

(*a*) He has completed three years' residence in the country;

(*b*) He has a spouse possessing the nationality of the country of residence. A refugee may not invoke the benefit of this provision if he has abandoned his spouse;

(*c*) He has one or more children possessing the nationality of the country of residence.

3. The Contracting States shall give sympathetic consideration to assimilating the rights of all refugees with regard to wage-earning employment to those of nationals, and in particular of those refugees who have entered their territory pursuant to programmes of labour recruitment or under immigration schemes.

Artidle 18.—Self-employment

The Contracting States shall accord to a refugee lawfully in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the right to engage on his own account in agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies.

Article 19.—Liberal professions

1. Each Contracting State shall accord to refugees lawfully staying in their territory who hold diplomas recognized by the competent authorities of that State, and who are desirous of practising a liberal profession, treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.

2. The Contracting States shall use their best endeavours consistently with their laws and constitutions to secure the settlement of such refugees in the territories, other than the metropolitan territory, for whose international relations they are responsible.

CHAPTER IV

WELFARE

Article 20.—Rationing

Where a rationing system exists, which applies to the population at large and regulates the general distribu-

tion of products in short supply, refugees shall be accorded the same treatment as nationals.

Article 21.—Housing

As regards housing, the Contracting States, in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord to refugees lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.

Article 22.—Public education

1. The Contracting States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education.

2. The Contracting States shall accord to refugees treatment as favourable as possible, and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, with respect to education other than elementary education and, in particular, as regards access to studies, the recognition of foreign school certificates, diplomas and degrees, the remission of fees and charges and the award of scholarships.

Article 23.—Public relief

The Contracting States shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals.

Article 24.—Labour legislation and social security

1. The Contracting States shall accord to refugees lawfully staying in their territory the same treatment as is accorded to nationals in respect of the following matters;

(*a*) In so far as such matters are governed by laws or regulations or are subject to the control of administrative authorities: remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on home work, minimum age of employment, apprenticeship and training, women's work and the work of young persons, and the enjoyment of the benefits of collective bargaining;

(*b*) Social security (legal provisions in respect of employment injury, occupational diseases, maternity, sickness, disability, old age, death, unemployment, family responsibilities and any other contingency which, according to national laws or regulations, is covered by a social security scheme), subject to the following limitations:

(i) There may be appropriate arrangements for the maintenance of acquired rights and rights in course of acquisition;

(ii) National laws or regulations of the country of residence may prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds, and concerning allowances paid to persons who do not fulfil the contribution conditions prescribed for the award of a normal pension.

2. The right to compensation for the death of a refugee resulting from employment injury or from occupational disease shall not be affected by the fact that the residence of the beneficiary is outside the territory of the Contracting State.

3. The Contracting States shall extend to refugees the benefits of agreements concluded between them, or which may be concluded between them in the future, concerning the maintenance of acquired rights and rights in the process of acquisition in regard to social security, subject only to the conditions which apply to nationals of the States signatory to the agreements in question.

4. The Contracting States will give sympathetic consideration to extending to refugees so far as possible the benefits of similar agreements which may at any time be in force between such Contracting States and non-contracting States.

CHAPTER V

ADMINISTRATIVE MEASURES

Article 25.—Administrative assistance

1. When the exercise of a right by a refugee would normally require the assistance of authorities of a foreign country to whom he cannot have recourse, the Contracting States in whose territory he is residing shall arrange that such assistance be afforded to him by their own authorities or by an international authority.

2. The authority or authorities mentioned in paragraph 1 shall deliver or cause to be delivered under their supervision to refugees such documents or certifications as would normally be delivered to aliens by or through their national authorities.

3. Documents or certifications so delivered shall stand in the stead of the official instruments delivered to aliens by or through their national authorities, and shall be given credence in the absence of proof to the contrary.

4. Subject to such exceptional treatment as may be granted to indigent persons, fees may be charged for the services mentioned herein, but such fees shall be moderate and commensurate with those charged to nationals for similar services.

5. The provisions of this article shall be without prejudice to articles 27 and 28.

Article 26.—Freedom of movement

Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of

residence and move freely within its territory subject to any regulations applicable to aliens generally in the same circumstances.

Article 27.—Identity papers

The Contracting States shall issue identity papers to any refugee in their territory who does not possess a valid travel document.

Article 28.—Travel documents

1. The Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require, and the provisions of the Schedule to this Convention shall apply with respect to such documents. The Contracting States may issue such a travel document to any other refugee in their territory; they shall in particular give sympathetic consideration to the issue of such a travel document to refugees in their territory who are unable to obtain a travel document from the country of their lawful residence.

2. Travel documents issued to refugees under previous international agreements by Parties thereto shall be recognized and treated by the Contracting States in the same way as if they had been issued pursuant to this article.

Article 29.—Fiscal charges

1. The Contracting States shall not impose upon refugees duties, charges or taxes, of any description whatsoever, other or higher than those which are or may be levied on their nationals in similar situations.

2. Nothing in the above paragraph shall prevent the application to refugees of the laws and regulations concerning charges in respect of the issue to aliens of administrative documents including identity papers.

Article 30.—Transfer of assets

1. A Contracting State shall, in conformity with its laws and regulations, permit refugees to transfer assets which they have brought into its territory, to another country where they have been admitted for the purposes of resettlement.

2. A Contracting State shall give sympathetic consideration to the application of refugees for permission to transfer assets wherever they may be and which are necessary for their resettlement in another country to which they have been admitted.

Article 31.—Refugees unlawfully in the country of refuge

1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a terirtory where their life or freedom was threatened in the sense of article 1, enter or are present in their territoy without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admissions into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

Article 32.—Expulsion

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due

process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority of a person or persons specially designated by the competent authority.

3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

Article 33.—Prohibition of expulsion or return ("refoulement")

1. No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

Article 34.—Naturalization

The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.

CHAPTER VI

EXECUTORY AND TRANSITORY PROVISIONS

Article 35.—Co-operation of the national authorities with the United Nations

1. The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.

2. In order to enable the Office of the High Commissioner or any other agency of the United Nations which may succeed it, to make reports to the competent organs of the United Nations, the Contracting States undertake to provide them in the appropriate form with information and statistical data requested concerning:

(*a*) The condition of refugees,

(*b*) The implementation of this Convention and,

(*c*) Laws, regulations and decrees which are, or may hereafter be, in force relating to refugees.

Article 36.—Information on national legislation

The Contracting States shall communicate to the Secretary-General of the United Nations the laws and regulations which they may adopt to ensure the application of this Convention.

Article 37.—Relation to previous conventions

Without prejuduice to article 28, paragraph 2, of this Convention, this Convention replaces, as between Parties to it, the Arrangements of 5 July 1922, 31 May 1924, 12 May 1926, 30 June 1928 and 30 July 1935, the Conventions of 28 October 1933 and 10 February 1938, the

Protocol of 14 September 1939 and the Agreement of 15 October 1946.

CHAPTER VII

FINAL CLAUSES

Article 38.—Settlement of disputes

Any dispute between Parties to this Convention relating to its interpretation or application, which cannot be settled by other means, shall be referred to the International Court of Justice at the request of any one of the parties to the dispute.

Article 39.—Signature, ratification and accession

1. This Convention shall be opened for signature at Geneva on 28 July 1951 and shall thereafter be deposited with the Secretary-General of the United Nations. It shall be open for signature at the European Office of the United Nations from 28 July to 31 August 1951 and shall be re-opened for signature at the Headquarters of the United Nations from 17 September 1951 to 31 December 1952.

2. This Convention shall be open for signature on behalf of all States Members of the United Nations, and also on behalf of any other State invited to attend the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons or to which an invitation to sign will have been addressed by the General Assembly. It shall be ratified and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.

3. This Convention shall be open from 28 July 1951 for accession by the States referred to in paragraph 2 of this article. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 40.—Territorial application clause

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convetion enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article 41.—Federal clause

In the case of a Federal or non-unitary State, the following provisions shall apply:

(*a*) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal legislative authority, the obligations of the Federal Government shall to this extent be the same as those of parties which are not Federal States;

(*b*) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent States, provinces or cantons which are not, under the constitutional system of the Federation, bound to take legislative action, the Federal Government shall bring

such articles with a favourable recommendation to the notice of the appropriate authorities of States, provinces or cantons at the earliest possible moment;

(*c*) A Federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the Federation and its constituent units in regard to any particular provision of the Convention showing the extent to which effect has been given to that provision by legislative or other action.

Article 42.—Reservations

1. At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1, 3, 4, 16(1), 33, 36-46 inclusive.

2. Any State making a reservation in accordance with paragraph 1 of this article may at any time withdraw the reservation by a communication to that effect addressed to the Secretary-General of the United Nations.

Article 43.—Entry into force

1. This Convention shall come into force on the ninetieth day following the day of deposit of the sixth instrument of ratification or accession.

2. For each State ratifying or acceding to the Convention after the deposit of the sixth instrument of ratification or accession, the Convention shall enter into force on the ninetieth day following the date of deposit by such State of its instrument of ratification or accession.

Article 44.—Denunciation

1. Any Contracting State may denounce this Convention at any time by a notification addressed to the Secretary-General of the United Nations.

2. Such denunciation shall take effect for the Contracting State concerned one year from the date upon which it is received by the Secretary-General of the United Nations.

3. Any State which has made a declaration or notification under article 40 may, at any time thereafter, by a notification to the Secretary-General of the United Nations, declare that the Convention shall cease to extend to such territory one year after the date of receipt of the notification by the Secretary-General.

Article 45.—Revision

1. Any Contracting State may request revision of this Convention at any time by a notification addressed to the Secretary-General of the United Nations.

2. The General Assembly of the United Nations shall recommend the steps, if any, to be taken in respect of such request.

Article 46.—Notifications by the Secretary-General of the United Nations

The Secretary-General of the United Nations shall inform all Members of the United Nations and non-member States referred to in article 39:

(*a*) Of declarations and notifications in accordance with section B of article 1;

(*b*) Of signatures, ratifications and accessions in accordance with article 39;

(*c*) Of declarations and notifications in accordance with article 40;

(*d*) Of reservations and withdrawals in accordance with article 42;

(*e*) Of the date on which this Convention will come into force in accordance with article 43;

(*f*) Of denunciations and notifications in accordance with article 44;

(*g*) Of requests for revision in accordance with article 45.

IN FAITH WHEREOF the undersigned, duly authorized, have signed this Convention on behalf of their respective Governments.

DONE at Geneva, this twenty-eighth day of July, one thousand nine hundred and fifty-one, in a single copy, of which the English and French texts are equally authentic and which shall remain deposited in the archives of the United Nations, and certified true copies of which shall be delivered to all Members of the United Nations and to the non-member States referred to in article 39.

11. The United Nations Protocol Relating to the Status of Refugees, Jan. 11, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, provides:

PROTOCOL RELATING TO THE STATUS OF REFUGEES

The States Parties to the present Protocol,

Considering that the Convention relating to the Status of Refugees done at Geneva on 28 July 1951 [1] (hereinafter referred to as the Convention) covers only those persons who have become refugees as a result of events occurring before 1 January 1951,

Considering that new refugee situations have arisen since the Convention was adopted and that the refugees concerned [sic] may therefore not fall within the scope of the Convention,

Considering that it is desirable that equal status should be enjoyed by all refugees covered by the definition in the Convention irrespective of the dateline 1 January 1951,

Have agreed as follows:

[1] 189 UNTS 150.

Article I

GENERAL PROVISION

1. The States Parties to the present Protocol undertake to apply articles 2 to 34 [2] inclusive of the Convention to refugees as hereinafter defined.

2. For the purpose of the present Protocol, the term "refugee" shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article 1 of the Convention as if the words "As a result of events occurring before 1 January 1951 and . . ." and the words ". . . as a result of such events", in article 1 A (2) were omitted.

3. The present Protocol shall be applied by the States Parties hereto without any geographic limitation, save that existing declarations made by States already Parties to the Convention in accordance with article 1 B (1) (*a*) of the Convention, shall, unless extended under article 1 B (2) thereof, apply also under the present Protocol.

Article II

CO-OPERATION OF THE NATIONAL AUTHORITIES WITH THE UNITED NATIONS

1. The States Parties to the present Protocol undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the present Protocol.

2. In order to enable the Office of the High Commissioner, or any other agency of the United Nations which

[2] See p. 6264.

may succeed it, to make reports to the competent organs of the United Nations, the States Patries to the present Protocol undertake to provide them with the information and statistical data requested, in the appropriate form, concerning:

(*a*) The condition of refugees;

(*b*) The implementation of the present Protocol;

(*c*) Laws, regulations and decrees which are, or may hereafter be, in force relating to refugees.

Article III

INFORMATION ON NATIONAL LEGISLATION

The States Parties to the present Protocol shall communicate to the Secretary-General of the United Nations the laws and regulations which they may adopt to ensure the application of the present Protocol.

Article IV

SETTLEMENT OF DISPUTES

Any dispute between States Parties to the present Protocol which relates to its interpretation or application and which cannot be settled by other means shall be referred to the International Court of Justice at the request of any one of the parties to the dispute.

Article V

ACCESSION

The present Protocol shall be open for accession on behalf of all States Parties to the Convention and of any other State Member of the United Nations or member of any of the specialized agencies or to which an invitation to accede may have been addressed by the General

Assembly of the United Nations. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article VI

FEDERAL CLAUSE

In the case of a Federal or non-unitary State, the following provisions shall apply:

(*a*) With respect to those articles of the Convention to be applied in accordance with article I, paragraph 1, of the present Protocol that come within the legislative jurisdiction of the federal legislative authority, the obligations of the Federal Government shall to this extent be the same as those of States Parties which are not Federal States;

(*b*) With respect to those articles of the Convention to be applied in accordance with article I, paragraph 1, of the present Protocol that come within the legislative jurisdiction of constitutent States, provinces or cantons which are not, under the constitutional system of the federation, bound to take legislative action, the Federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of States, provinces or cantons at the earliest possible moment;

(*c*) A Federal State Party to the present Protocol shall, at the request of any other State Party hereto transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the Federation and its constituent units in regard to any particular provision of the Convention to be applied in accordance with article I, paragraph 1, of the present Protocol, showing the extent to which effect has been given to that provision by legislative or other action.

Article VII

RESERVATIONS AND DECLARATIONS

1. At the time of accession, any State may make reservations in respect of article IV of the present Protocol and in respect of the application in accordance with article I of the present Protocol of any provisions of the Convention other than those contained in articles 1, 3, 4, 16 (1) and 33 thereof, provided that in the case of a State Party to the Convention reservations made under this article shall not extend to refugees in respect of whom the Convention applies.

2. Reservations made by States Parties to the Convenveniton in accordance with article 42 thereof shall, unless withdrawn, be applicable in relation to their obligations under the present Protocol.

3. Any State making a reservation in accordance with paragraph 1 of this article may at any time withdraw such reservation by a communication to that effect addressed to the Secretary-General of the United Nations.

4. Declaration made under article 40, paragraphs 1 and 2, of the Convention by a State Party thereto which accedes to the present Protocol shall be deemed to apply in respect of the present Protocol, unless upon accession a notification to the contrary is addressed by the State Party concerned to the Secretary-General of the United Nations. The provisions of article 40, paragraphs 2 and 3, and of article 44, paragraph 3, of the Convention shall be deemed to apply *mutatis mutandis* to the present Protocol.

Article VIII

ENTRY INTO FORCE

1. The present Protocol shall come into force on the day of deposit of the sixth instrument of accession.

2. For each State acceding to the Protocol after the deposit of the sixth instrument of accession, the Protocol shall come into force on the date of deposit by such State of its instrument of accession.

Article IX

DENUNICIATION

1. Any State Party hereto may denounce this Protocol at any time by a notification addressed to the Secretary-General of the United Nations.

2. Such denunciation shall take effect for the State Party concerned one year from the date on which it is received by the Secretary-General of the United Nations.

Article X

NOTIFICATIONS BY THE SECRETARY-GENERAL OF THE UNITED NATIONS

The Secretary-General of the United Nations shall inform the States referred to in article V above of the date of entry into force, accessions, reservations and withdrawals of reservations to and denunciations of the present Protocol, and of declarations and notifications relating hereto.

Article XI

DEPOSIT IN THE ARCHIVES OF THE SECRETARIAT OF THE UNITED NATIONS

A copy of the present Protocol, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, signed by the President of the General Assembly and by the Secretary-General of the United Nations, shall be deposited in the archives of the Secretariat of the United Nations. The Secretary-General will trans-

mit certified copies thereof to all States Members of the United Nations and to the other States referred to in article V above.

12. Article 22 of the United Nations Convention on the High Seas provides:

Article 22

1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters a foreign merchant ship on the high seas is not justified in boarding her unless there is reasonable ground for suspecting:

(*a*) That the ship is engaged in piracy; or
(*b*) That the ship is engaged in the slave trade; or
(*c*) That, though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

2. In the cases provided for in sub-paragraphs (*a*), (*b*) and (*c*) above, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.

3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.

13. Articles 31 and 32 of the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, provide:

Article 31. General Rule of Interpretation

(1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the

terms of the treaty in their context and in the light of its object and purpose.

(2) The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

(3) There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

(4) A special meaning shall be given to a term if it is established that the parties so intended.

Article 32. Supplementary Means of Interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable.

14. Article 110 of the United Nations Convention on the Law of the Sea, Dec. 10, 1982, provides:

Article 110

Right of visit

1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96, is not justified in boarding it unless there is reasonable ground for suspecting that:

(a) the ship is engaged in piracy;

(b) the ship is engaged in the slave trade;

(c) the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under article 109;

(d) the ship is without nationality; or

(e) though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

2. In the cases provided for in paragraph 1, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.

3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.

4. These provisions apply *mutatis mutandis* to military aircraft.

5. These provisions also apply to any other duly authorized ships or aircraft clearly marked and identifiable as being on government service.

SUPREME COURT OF THE UNITED STATES

No. 92-344

GENE MCNARY, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, ET AL., PETITIONERS

v.

HAITIAN CENTERS COUNCIL, INC., ET AL.

ORDER ALLOWING CERTIORARI
Filed October 5, 1992

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

October 5, 1992

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